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JOHNSON'S

CHANCERY REPORTS.

VOL. V.

Apr 13

5.

Fred. D. Hobbs.

REPORTS

OF

CASES

ADJUDGED IN THE

COURT OF CHANCERY

OF

NEW-YORK.

BY WILLIAM JOHNSON,
Counsellor at Law.

VOL. V.

CONTAINING THE CASES FROM DECEMBER, 1820,
TO DECEMBER, 1821, INCLUSIVE.

ALBANY:
PUBLISHED BY E. F. BACKUS, STATE-STREET.
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1822.

Southern District of New-York, ss.

BE IT REMEMBERED, that on the twenty-first day of November, in the forty-seventh year of the Independence of the United States of America, William Johnson, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"Reports of Cases adjudged in the Court of Chancery of New-York. By William Johnson, Counsellor at Law. Vol. V. containing the Cases from December, 1820, to December, 1821, inclusive."

In conformity to the Act of the Congress of the United States, entitled, "An Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned." And also to an Act, entitled, "An Act, supplementary to an Act, entitled, an Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,
Clerk of the Southern District of New-York.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF

NEW-YORK.

JAMES KENT, Esq. CHANCELLOR.

STEERE and others *against* STEERE and others.(a)

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Sept. 1st, and Oct. 2d.

Though a trust need not be created by writing, yet, to take the case out of the statute of frauds, its terms and conditions must be clearly manifested and proved in writing, under the hand of the party to be charged, before the Court will carry it into execution.

Loose and general declarations of intention, by one member of a family, of holding property in trust for the other members, are not sufficient for the deduction of a *trust* which equity will recognise and enforce. Letters and accounts addressed by *S.*, to his brothers, under the circumstances, were held insufficient to raise a trust, by implication, to the father.

Parol evidence to contradict the inference as to a trust, deduced from written documents, is inadmissible; but, it seems, that where written documents are loose and ambiguous, parol evidence is admissible, to explain the obscurity of the case, and to show what was the understanding of all the parties concerned.

To raise a trust by implication, or operation of law, an actual payment, or actual loan of the money by the *cestui que trust*, at the time of the purchase, must be shown.

THE original bill, filed *February* 21st, 1818, stated, among other things, that *Stephen Steere*, father of the plain-

(a) This and the three following cases were omitted in their order in the *fourth* volume.

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tiffs, *Timothy, Smith*, and *T. Steere*, was seised in fee, prior to the 18th of *October*, 1802, of various parcels of land in the county of *Chenango*, and which were particularly described, amounting in the whole to 739 acres, and all of which, except 47 acres, was situate in the town of *Norwich*.

That on the 18th of *October*, 1802, *S. Phettiplace* obtained a judgment against *Stephen Steere*, for 1,258 dollars, on which a *fi. fa.* was issued in 1805, and all the lands of *Stephen Steere*, in the county of *Chenango*, advertised for sale. That *Richard Steere* and *Mark Steere*, defendants, sons of *Stephen Steere*, in *August*, 1806, bid off all the real estate of *Stephen Steere*, at the sheriff's sale, for 1,600 dollars, and paid 1,400 dollars, the amount of the judgment, interest, and costs, and took a deed from the sheriff for "the whole of the real estate of *Stephen Steere*, in the county of *Chenango*, and his right and title thereto:" and the levy and advertisement of the lands, by the sheriff, were in the same general terms of description. The bill alleged that the deed was taken in trust, pursuant to a previous agreement with *Stephen Steere*, to loan him the amount of the judgment, and to hold the land as security, to be reconveyed, on repayment of the loan, with interest and expenses, and of such other sums as might thereafter be loaned to *Stephen Steere*, by *Richard* and *Mark Steere*. That the *Cole Lot*, containing 120 acres, belonging to *Stephen Steere*, was sold by the sheriff, under a judgment and execution in favour of *James Glover*, in *December*, 1799, to *James Glover*, for 140 dollars, being much less than its value; and that *James Glover* agreed to reconvey the land to *Stephen Steere*, on the payment of the 140 dollars, and interest. That in *August*, 1809, *Mark Steere* released to *Richard Steere*, all his interest in the lands under the sheriff's deed of *August*, 1805, and became insolvent: That on the 30th of *April*, 1808, *James Glover* conveyed to *Asel Steere*, defendant, another son of *Stephen Steere*, the *Cole and Glover Farms*; that *Asel Steere* conveyed the same farms to *Rich-*

ard and *Mark Steere*. That the purchase was made pursuant to an agreement with *Stephen Steere*, and that *Asel Steere* acted merely as the agent of *Richard* and *Mark Steere*, and the land was to be held in trust for *Stephen Steere*. That on the 14th of *August*, 1809, *Asel Steere* made a new conveyance to *Richard Steere*, of the *Cole* and *Glover Farms*. The bill then proceeded to state sales and conveyances of various parcels of the lands by *Richard Steere*, to different persons, and of the sums of money received by him on such sales, and for rents; all of which sales and conveyances were alleged to be made by *Richard Steere*, as trustee, &c.

The bill alleged, that the deed of *August*, 1805, from the sheriff to *Richard* and *Mark Steere*, was void at law, as the description of the lands sold was too general and undefined. That in 1806, *Stephen Steere* requested *Richard* and *Mark Steere* to reconvey to him all the property, except the *Unadilla Farm*, being 325 acres, which he agreed that they might retain in satisfaction for their advances, &c.; and which far exceeded the value of all their advances, which they neglected to do. That *Stephen Steere* requested *Richard* and *Mark Steere* to account to him for all the moneys received by them, as trustees, from the sales, rents, and profits of the lands, after allowing the money advanced by them on the judgment of *Phettiplace*, and all their just expense and demands; but that *Richard* and *Mark Steere* presented unjust and false accounts of moneys, which they pretended to have advanced, the items of which were particularly set forth; and insisted on holding the property to cover the same. That on the 25th of *October*, 1815, *Stephen Steere* made his will, reciting the lands of which he was seised in *Norwich*, and particularly describing the same, and declaring, that "it was his intention to dispose of all his real and personal estate wheresoever, to his three sons, plaintiffs, viz: the one moiety thereof to *Timothy*, and the other moiety to *Smith* and *Thomas*. That he appointed

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James Birdsall his executor. That the testator died *April* 22d, 1816, without being in debt, and the plaintiffs were thus devisees and legatees of all his real and personal estate. That *Richard* and *Mark Steere* refused to account and convey to them the property, so held in trust; that the trusts had been acknowleged by *Richard* and *Mark*, in letters and accounts. That the plaintiffs were willing to confirm all the sales made by *Richard* and *Mark*, not confirmed by *Stephen Steere*, in his life time, but that *Richard* and *Mark* ought to account for the moneys, and assign the securities received by them. That *Richard Steere* had brought a suit at law against the plaintiff *Timothy Steere*, on his bond for 540 dollars. given to *Richard Steere*, for a part of the trust property sold and conveyed by him to *Timothy Steere*, but that the plaintiff, *Timothy*, cannot plead at law, the various and complicated trusts above mentioned. The bill *prayed* that the defendants, *Richard* and *Mark Steere*, may be decreed to account to the plaintiffs for the rents and profits received by them on the lands so held in trust, and for the moneys and securities received on sales, &c., making to them all just allowances for loans, advances, and expenses; and to pay over the balance to the plaintiffs, and reconvey to them the lands so held in trust and undisposed of, and for general relief, and for an injunction against the suit at law. By an *amendment* to the original bill, the *accounts* and *letters*, said to contain an acknowlegment of the trust, were set forth at large and several special interrogations added.

The defendants, *Richard* and *Mark Steere*, in their *answers*, the whole of which it is unnecessary to state, denied the trusts alleged in the bill, or any agreement whatever, to advance money, and to purchase and hold the property in trust, or any conversation, before or after the sale, with *Stephen Steere*, relative to a purchase in trust. *Richard Steere* admitted, that *Asel Steere* informed him of the execution, and that it was the wish of all the brothers that he and *Mark Steere* should attend the sale and buy in the pro-

perty, so as to deprive *Stephen Steere* of all control over it, as he was then much embarrassed. They admitted that *Stephen Steere* acquiesced in the sale, under the idea that it would be better for the defendants, *Richard* and *Mark Steere*, to have the land than strangers; that it might have been the hope and expectation of *Stephen Steere*, and his children, that *Richard* and *Mark Steere*, would give a share of the property to them. That *Richard* and *Mark Steere* had often advanced large sums of money to *Stephen Steere*, to save his stock, &c., and permitted him to reside on part of the estate. That the defendant, *Richard Steere*, may have promised the plaintiffs to distribute part of the real estate among them, and may have said and written things for that purpose; and had made gifts of land and money with that view; but they denied that these acts of kindness amounted to a trust. That pursuant to an agreement between *Richard* and *Mark Steere*, *Timothy* and *Stephen Steere*, jun., of *January*, 1814, by which *Richard Steere* agreed to convey to *Mark Steere*, and *Timothy Steere*, each, land to the value of 1,000 dollars, he conveyed 43 acres to *Stephen Steere*, jun., 33 acres to *Mark Steere*, and 38 acres to *Timothy Steere*, and that he took the bond of *Timothy Steere*, for 540 dollars, being the excess in the value of the land conveyed to him, over and above the 1,000 dollars. That these deeds were gratuitous. That by that agreement he was to convey the residue of the land to *Timothy Steere* and *Mark Steere*, who were to sell the same, and pay the defendant his expenses and advances; but owing to the failure of *Mark Steere*, the agreement was only in part carried into effect. But he denied that any of these gifts and conveyances were made with the understanding or belief, that he was bound as trustee to *Stephen Steere*. The defendants, *Richard* and *Mark*, admitted the account of the 28th of *January*, 1809, but denied that it was made up and presented by them as trustees; that the account of the estate was on loose papers, prior to 1809, and the account

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was made out from those papers, which are now mislaid, or in the possession of the plaintiffs. That the name of *Stephen Steere* was used in the account to distinguish the estate from the other estate of *Richard* and *Mark*, and that the name of *Stephen Steere* was used as a debtor, because the estate was looked upon as a family patrimony, in which, from the gratuities of *Richard Steere*, they expected to share. That *Mark Steere*, at that time, proposed to release his share, on being paid his advances, &c., and the account was made up to ascertain the consideration to be paid to *Mark Steere*, which was found to amount to 3,901 dollars and 80 cents, which *Richard Steere* paid to *Mark Steere*. That *Richard Steere* then made an estimate of what further advances he had made, and in the same form, using the name of *Stephen Steere* as a debtor, and *Richard Steere* as creditor, for the sake of convenience. That the account was made out for the satisfaction of the plaintiffs and the family, and to show that any further demands on him were unreasonable. That the account was retained by him as a private memorandum, until *February*, 1814, and to assist in the gratuitous disposition of the property among the family. That in *January*, 1814, an agreement by parol was entered into between *Richard Steere*, *Mark Steere*, and the plaintiffs, of which a memorandum was reduced to writing by *James Birdsall*, and which was acceded to by *Richard Steere*, on the ground that it would be satisfactory; and to facilitate it, and not as trustee, he wrote the letter mentioned in the amended bill, to *Mark Steere*, dated *February* 12th, 1814, containing the account, &c., of *January* 28th, 1809, but he denied that the letter was written at the request of *Stephen Steere*, or as trustee. That in 1815 *Stephen Steere* was nearly eighty years old, and was induced by the plaintiffs, his younger children, to make his will in their favour, to the exclusion of his eight other children then living.

One of the accounts of the 28th of *January*, 1809, referred

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to in the bill, made *Stephen Steere* debtor to *Mark Steere*, for his bond dated *September* 3d, 1803, and the interest thereon at 8 per cent. and for various sums advanced, and for expenses of two journeys to *Chenango*, the whole amounting to 3,901 dollars and 80 cents. The other account was against *Stephen Steere*, as debtor to *Richard Steere*, containing different charges for sums advanced, among which were the expenses of several journeys to *Chenango*, and at the foot were added various charges for advances, under subsequent dates, among which was one of 1,000 dollars, towards a mortgage to *Glover*, the whole amount being 3,016 dollars and 26 cents. In a letter from *Richard* to *Mark Steere*, dated *Smithfield*, *February* 12th, 1814, the former writes, as follows: "I herewith present you with the amount of my account against the estate of *Stephen Steere*, as follows: *Richard* and *Mark Steere's* account against *Stephen Steere*, as appears by the original account, and your casting up to 28th of *May*, 1810, amounts to 7,840 dollars, and 46 cents, four years *interest*, 3.126 dollars 16 cents, the *Glover* debt when settled, in *March*, 1813, and costs, 2,600 dollars, and interest thereon, 286 dollars." Certain credits were also stated, among which was 500 dollars, on a sale of land to *Gunn*, and for the *Unadilla Farm*, 6,000 dollars, leaving a balance of 6,085 dollars and 62 cents due *Richard Steere*. A note of the sums due for lands sold was subjoined, amounting to 6,720 dollars. The letter continued as follows: "So that you will see by this statement, that you will pay me and retain 110 acres on the south side of the way, to pay you and *Stephen*, and the remainder divide. I think you may do as well, or nearly as well, as above stated. I send the original account, for the satisfaction of *Stephen* and *Timothy*, together with a paper, on which you have heretofore cast it, both of which papers I wish you to keep, as they may hereafter be wanted. The old account had been agreed to by father." In a letter, dated *Smithfield*, *October* 19th, 1806, *Richard Steere*

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writes to *Asel Steere*, as follows: "I wish you to assist father in every possible way in acquiring a good title to his land from *Glover*, and likewise to get *White's* lease on the *Unadilla Farm* settled, as there is a prospect of selling that this fall."—"If in case we sell it, I don't know but it will be necessary for father to come down and take a quit claim from us, and give a warrantee deed, but if we trade, I will write you further on this subject; at any rate, I wish to have it clear of *White's* lease, but, as it seems some fatality attends all father's business, I am not in much expectation of its being soon done."—"It is particularly necessary for father to attend to this business, as we are called upon for the money advanced, and shall be under the disagreeable necessity of selling other land, in order to reimburse ourselves, and which father and the family would choose to keep in preference to the *Unadilla Farm*. I am particularly unfortunate in all my dealings with father; for at the time we were up last year, a little before which I understood by him, that his object in redeeming his land was on account of its going to the family, and not to strangers; I inferred from that, if in case it came into our hands, he would certainly have no objections to our deeding a part to his children; under those circumstances, I assisted in raising the money, with a promise to many of the family, that it should not go out of my hands without their having a part, which I believe you will very well recollect. Now, it seems, I must either break my promise with my brethren, or incur the heavy displeasure of my father. I must confess that the situation of the *Glover Lot*, lying so long, when the probability of its going to strangers was so great, with the averseness to deeding to his sons, does not, in my opinion, square with his conversation last year, above written."—"If there is any compromise that can take place between father and my brothers, whether in lands or any otherwise, so that I may escape the heavy sin of a breach of promise, I shall with all cheerfulness acquiese in it; but,

by the way, *Jane* would expect to be included." In another letter, dated *Smithfield*, 9th of *July*, 1807, *Richard* writes to his brother *Asel*, as follows: "Father wishes very much for *Mark* and I to reconvey back all the land in your county, in our purchases, except the *Unadilla Farm*, which we cannot at this time comply with. As there seems to be a willingness on *Mark's* part to reconvey, whenever he is paid, it makes it hard, on my part, to perform my engagements with my brethren, and give father satisfaction. He appears to be willing to give *Stephen* and *Timothy* a 1,000 dollars each, *Jane* 500 dollars, and defray *Simon's* expenses at *Doctor Bellows*. *Timothy* is willing to take his, and I wish you to use your influence with *Stephen* to consent to take his, or agree with father some other way, for really, I wish the matter settled."

In a letter, dated *Smithfield*, 8th of *August*, 1809, from *Richard Steere*, to *Stephen*, *Asel*, and *Timothy Steere*, after mentioning the loss of a vessel and cargo belonging to *Mark*, and that all his property was attached, and that he, *Richard*, was left bound with him for a large amount, without security, unless he could be secured in *Chenango* county, *Richard* adds: "I herewith send a deed from *Mark* to me, last winter, which I hope you will lose no time in having acknowleged and recorded. You will see the necessity of this; for otherwise, *Mark* holds more than treble the land which is justly due to him, which is wholly lost to his family, if his creditors here should attach it, before my deed should be recorded. The deed or deeds made to *Mark* and I of the *Cole* and *Glover Lots* from *Asel*, now in the hands of *Stephen*, must be given up or destroyed, and a deed or deeds made to me, at the same prices, which last must be recorded."—"I wish his creditors to have all his property, but to have the other property, which he holds to a large amount for security, torn from the family, would be distressing indeed." Several witnesses

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were examined on both sides, the material part of whose testimony is stated in the opinion of the Court.

The cause came on to be heard this day.

Sept. 1st.

Henry, for the plaintiffs, contended, 1. That the deed of the 10th of *August*, 1805, from the sheriff to *Richard* and *Mark Steere*, was not a valid conveyance; the description of the lands conveyed being too vague and uncertain. (1 *Johns. Cases*, 287. 2 *Caines' Rep.* 66. 11 *Johns. Rep.* 373. 13 *Johns. Rep.* 551. 16 *Johns. Rep.* 122.)

2. That if that deed was valid; yet *Richard* and *Mark Steere* purchased and held the lands in *trust* for *Stephen Steere*, their father, after payment and satisfaction of their advances, costs, and expenses. That this *trust* was clearly demonstrated by the written evidence in the case. He cited *Forster* v. *Hale*, 3 *Vesey*, jun., 696. 707, 708. 710. *Tawney* v. *Crowther*, 3 *Bro. C. C.* 318. *O'Hare* v. *O'Neil*, *Bro. P. C.* 227. *Forster* v. *Hale*, 5 *Vesey*, 308, 309, 310. 315. *Roberts on Frauds*, 102. 1 *Johns. Ch. Rep.* 302. 591. *Green* v. *Stephens*, 17 *Vesey*, 74.

The *parol* evidence as to the trust, he contended, ought to be rejected.

Van Buren, contra, insisted, 1. That no trust had been established by the written evidence; and that if the *parol* evidence was admitted, it clearly destroyed the alleged trust. He cited 12 *Vesey*, 67. 5 *Vesey*, 308.

2. That the plaintiffs had adequate relief at law, as to the property, the title to which had not been confirmed by their ancestor; and admitting that there was a balance due to them from the lands, the sale of which had been confirmed by their father, the plaintiffs were not entitled to it, as it had not been devised to them. 6 *Term Rep.* 610. *Cowper*, 660, 661. *Doug.* 759.

3. That the surplus arising from the sales so confirmed

by the father of the plaintiffs, being personal property, the bill should have been filed by the executor, or those entitled under the statute of distributions.

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The cause stood over for consideration to this day.

THE CHANCELLOR. The bill charges that the purchase by the defendants, *Richard* and *Mark Steere*, at the sheriff's sale, on the 16th of *August*, 1805, was in trust for the plaintiff's testator, and those defendants are called upon to account to the plaintiffs, as devisees, for the rents and profits, and for the proceeds of that part of the lands which have since been conveyed to others, and to reconvey to the plaintiffs that part of the lands which they still retain. *October 2d.*

It is intimated in the bill, and it was made a point at the hearing by the counsel for the plaintiffs, that the sheriff's sale was void, and that the deed in pursuance of it was invalid, for want of designation and description of the lands sold. If this were so, then the plaintiffs, as devisees of *Stephen Steere*, the original owner, in *August*, 1805, would have their fit and adequate remedy at law, for the lands now sought by the bill. In respect to any claim for the proceeds of the estate, I apprehend the executor of *Stephen Steere* ought to have been a party to the bill; for these proceeds in the hands of the defendants were personal property, and if they were bequeathed at all to the plaintiffs by the will, (which cannot very readily be admitted,) the executor is the proper person to call the defendants to account, and to distribute the personal estate under the directions of the will.

But I shall not dwell upon this difficulty in the case, but proceed at once to the examination of the question on which the whole foundation of the bill rests, viz. is there a trust sufficiently manifested in writing, to be recognized and enforced in this Court?

To take the case out of the statute of frauds, the trust must appear in writing, under the hand of the party to be charged, with absolute certainty as to its nature and terms,

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before the Court can undertake to execute it. The words of the statute of frauds are, "That all declarations or creations of trusts or confidences, of any lands, &c. shall be manifested and proved by some writing, signed by the party who is, or shall be by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of none effect." A trust need not be created by writing, but it must be manifested and proved by writing; and the doctrine in *Forster* v. *Hale*, (3 *Vesey*, 696.) is that the nature of the trust, and the terms and conditions of it, must sufficiently appear, so that the Court may not be called upon to execute the trust in a manner different from that intended.

In this case, the testator, *Stephen Steere*, at the age of seventy, was much in debt and embarrassed; and among other debts there was a judgment against him, amounting with interest and costs, to 1,400 dollars. He was utterly unable to satisfy it, and his lands in the county of *Chenango* were advertised for sale on execution. He had eleven children, at the time, and the defendants, *Richard* and *Mark Steere*, (who were two of them,) attended the sale and purchased the property for 1,600 dollars, and advanced the money out of their own funds, and took the sheriff's deeds in their own names. This was in *August*, 1805, and it appears to have been a fair purchase at public auction. The natural consequence of such a transaction is, that these two sons would not be inclined to speculate upon their aged father's misfortunes, and make a profitable bargain to themselves, to the injury of him and his other children. Considerations arising from the ties of blood and the dictates of family affection, would ordinarily lead such a purchaser to offer to restore the property, on being reimbursed his advances and indemnified for his trouble, or else to engage that all the profits of the purchase should be applied justly, and equitably, to the common benefit of the family But intentions and intimations of that kind cannot well be considered as amounting to a clear and

absolute trust, which a Court of equity will recognise and enforce, unless the declaration of it be quite positive and free from all ambiguity. Parents will usually make declarations and express intentions of holding their property for their children, but a technical trust would not easily be deduced from them, unless they were contained in a last will and testament made on purpose to dispose of the estate. It would be injurious to that freedom of intercourse, and to the operation of those kind and generous affections, which ought to be cherished in the circle of the domestic connexions, to make such deductions from loose and general expressions, in a confidential correspondence between one member of a family and another, and to give them the force and rigour of legal obligations. It ought also to be remembered, in respect to the obligations resulting from family connexion, and the effect to be given to them in courts of justice, that the *duty* of benevolence, to borrow an expression of Lord *Kames*, is much more limited than the *virtue*. *Sanguinis conjunctio benevolentia devincit homines et caritate.*

The first item of testimony from whence the plaintiffs undertake to show the trust, is a letter from the defendant, *Richard Steere*, to *Asel Steere*, dated *October* 19th, 1806, upwards of one year after the purchase under the sheriff's sale. This letter is not addressed to the testator, whom the bill alleges to have been the *cestui que trust*, and in that respect it differs essentially from the evidence from which a trust was deduced, in the cases of *O'Hare* v. *O'Neil*, (2 *Bro. P. C.* 39.) and *Forster* v. *Hale*. (3 *Vesey*, 696.) It is addressed to a stranger to the alleged trust, though a brother of the defendant, and it was evidently a letter on private and confidential business. The letters in the other cases were addressed to the *cestui que trust*, and there was then a reasonable ground of inference, (which is wanted in this case,) that the writer of the letter *intended* to give a manifestation or evidence of the trust. This same *Asel Steere* declares, in

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his answer, that the understanding between him and the defendants, *Richard* and *Mark Steere*, was, that the land was not to be reconveyed to the testator after the repayment of the money advanced and their expenses and trouble, but that the surplus should be held for the testator and his wife, and the seven children then residing in *Chenango* county.

This letter corresponds with the general view of the case, as given by *Asel Steere*, in his answer, and shows evidently that *Richard Steere* considered himself as holding the land, in the first place, for his reimbursement, and then, under some general and vague promise, to distribute the surplus among his brethren of the family. He says, he inferred that to be his father's wishes, even before he purchased, and that the land should go "to the family, and not to strangers." He says, therefore, he made "a promise to many of the family, that it (the land) should not go out of his hands without their having a part," and that he was not willing to "break his promise with his brethren."

The next letter addressed to *Asel Steere*, is dated *July* 9th, 1807, in which he says, his father "wished him and his brother *Mark* to reconvey back all the land except the *Unadilla* purchase." This, he said, he could not then do, because he could not "perform his engagements with his brethren and give his father satisfaction." The third letter of this defendant is dated *August* 8th, 1809, and is addressed to three of his brothers, of whom the plaintiff *Timothy* is one, and is material only for the idea which prevails through all the letters, that he and his brother *Mark* held the property for their security and for "the family."

There is not, therefore, in either of these three letters, any sufficient manifestation and evidence of the specific trust charged in the bill. The trust charged is in favour of *Stephen Steere*, the testator, but the trust vaguely intimated in these letters is one in favour of the family at large of *Stephen Steere*; and admitting a trust to have been duly manifested in favour of the children of *Stephen Steere*, (and

this is an admission which the evidence does not demand, for the suggestions and intimations in the letters are too indefinite and loose to be the foundation of a bill for specific execution,) yet the bill calls upon the Court to support the will of the testator, and to "execute the trust in a manner very different from that intended." This, Lord *Alvanley* admits, cannot be done.

The strongest evidence in favour of the trust charged, is contained in the letter from the defendant, *Richard Steere*, to his brother, the defendant, *Mark Steere*, dated *February* 12th, 1814, inclosing the account of these two defendants against *Stephen Steere*, of the date of *January* 28th, 1809.

In that account, *Stephen Steere* is charged as a debtor, with payments by *R.* and *M.* to the sheriff, at the time of the purchase by them in *August*, 1805, and with some expenses in relation to that business, and he is likewise credited with the sale of part of the lands held under the sheriff's deed. He says in the letter that the original account was sent "for the satisfaction of *Stephen* and *Timothy Steere*," and that "the old account had been agreed to by father."

The defendants, in their answer, admit, that the account of 1809 was once, and only once, shown to *Stephen Steere*, and then casually, and that it was made up with the intent to show how expensive the estate had been to them, and what advances had been made, and that it was made up from loose papers now mislaid, or in possession of the plaintiffs, and that the name of *Stephen Steere* was used as a debtor for convenience, and to distinguish the real estate derived from the sheriff's deed from the other estate of the defendants, and because the estate was looked upon as a family patrimony, in which the family expected to share. They aver in their answer, that the account was made out for the satisfaction of the plaintiffs and the family, and to show that further demands were unreasonable, and that the account of 1809 was retained by them, as a private memorandum, until *February*, 1814, and that additions were made to it from

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time to time, to assist in the gratuitous dispositions of the property among the family.

These explanations were given in answer to interrogatories specially pointed to those accounts, and by which they were required to answer, "whether the said accounts were not made out in the usual form of accounts."

It appears to me that the explanation is consistent with the proof applicable to those accounts, and with the general complexion of the entire transactions of the estate.

James Birdsall, a witness, states that in *January*, 1814, the defendants, *Richard Steere* and *Mark Steere*, entered into a parol agreement in relation to the lands so purchased at the sheriff's sale, with their brothers, *Stephen Steere*, jun., and the plaintiff, *Timothy Steere*. The substance of the agreement was reduced to writing, at the time, by the witness, at the request of the parties to it, and was approved of by them. That agreement was considered as a final settlement of all questions and claims in respect to that property, and it provided for a distribution of what remained of the estate, among certain of the children. The *memorandum* begins with these words: "*Richard Steere* will state his account to *Mark*, *Stephen*, and *Timothy Steere*:" and here we have the origin of the publication of the account produced by the plaintiffs as evidence of the trust. The account was sent to *Mark Steere*, in the letter of *Richard Steere*, of the 12th of *February*, 1814, and now we can understand the meaning of that paragraph in the letter, in which he says, "I send the original account for the satisfaction of *Stephen* and *Timothy*;" and also the force of another paragraph in which it is said, "so you will see by my statement that you will pay me and retain 110 acres on the south side of the way, to pay you and *Stephen*, and *the remainder to divide*."

This account and letter could not have been intended as a manifestation or declaration of a trust in favour of the testator. The manner in which it arose, and was transmit-

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ted, and the contents of the letter, are pretty satisfactory proof, that the explanation given of the account in the answer is the just and true explanation, and the only one of which the whole transaction is susceptible. The way in which these accounts came to the knowledge and possession of the plaintiffs, was by taking copies of the originals while in the hands of the defendant *Mark Steere*, and there was never any free and voluntary delivery for the purpose to which they have been applied. The only part of the letter which shows that the defendants considered themselves as acting in the purchase and management of the estate, as trustees for their father, the testator, is the expression that "the old account had been agreed to by father." This probably referred to the account of 1809; and though a loose paragraph, it would be difficult to understand it in any other sense than as an admission of the trust sought after, if it was not accompanied with other paragraphs in the same letter absolutely inconsistent with that fact. The account was sent only for the satisfaction of the two sons, (of whom the plaintiff *Timothy* was one,) and in pursuance of an agreement to distribute the surplus property among the children. The letter says, that after *Mark's* and *Stephen's* debts were satisfied, *the remainder was to be divided.* The whole letter must be taken together, and one expression checked and balanced by another. And when we take into consideration the manner in which that real estate had been dealt with by these two defendants, for ten years together, under the eye, and with the approbation of their father, the notion of any other trust than that founded upon brotherly good will, spontaneous promises, and gratuitous acts of benevolence to the family at large, including their father and all his other children, is utterly inadmissible. We have conveyances from the defendants of parts of the estate between 1809 and 1815, to strangers, for a valuable consideration, and to several of the children, as gifts, and

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all these acts confirmed by the testator. The agreement of 1814 was partly executed by the defendants, and the several voluntary transfers to the children, to the amount of 5,000 dollars in value, are decisive proofs, that the defendants have acted according to their original suggestions and intentions of applying the surplus property, after their indemnity, to the benefit of the family. The idea of a technical trust binding in equity in favour of the father, was never heard of in the family, or put forward by any branch of it, until after the two plaintiffs, *Thomas* and *Timothy Steere*, had obtained from *Mark Steere* copies of the accounts above referred to. I cannot easily reconcile this claim with good faith, after the agreement of 1814, and the extent to which it had been carried into execution by the defendants *Richard* and *Mark*. It also strikes me, considering the manner in which the purchase had been received and treated by the family of the testator, from the time it was made, down to the testator's death, and the many gifts and conveyances which the family have been content to receive at the hands of the defendants, that to enforce a strict trust with all the legal responsibilities attached to it, according to the doctrine of the bill, would be extremely unjust and oppressive.

A question has been raised, whether the parol evidence given in the case be admissible, to contradict the inference drawn by the plaintiffs from the accounts and the letters. If the written proof was clear and positive, it could not be rebutted by parol proof; but considering the loose and ambiguous nature of it, I am inclined to think the parol evidence is competent in support of the sheriff's deed, and to explain the obscurity of the case, by showing what was the understanding of all the parties concerned. In *Forster* v. *Hale*, parol proof was received, and taken into consideration by the Master of the Rolls, in forming his opinion; and in *Redington* v. *Redington*, (3 *Ridgeway's Cases in the Irish*

Parliament, 182.) parol evidence was held, by Lord *Clare*, to be admissible to support a deed in the name of the son, but inadmissible to create a trust against it. The cases of *Lamplugh* v. *Lamplugh*, and of *Taylor* v. *Taylor*, (1 *P. Wms.* 111. and 1 *Atk.* 386.) were referred to by the Lord Chancellor of *Ireland*, in confirmation of this principle. The parol proof in this case puts an end to all pretension of a trust in favour of the testator, and shows that by the acknowledgment of the testator and of all the family, the purchase at the sheriff's sale was absolute, without any trust or qualification whatsoever, and that none was ever heard of, or suggested in the family, until about the time that the testator made the will, giving all the undisposed part of the estate to the plaintiffs. It was the uniform and universal understanding in the family, for ten years, that the property was not to be reconveyed to the father, but was to be held, in the first place, for the indemnity of the two purchasers, and then, it was submitted to their discretion and justice, in what manner and mode, and to what extent, the surplus should be appropriated to the wishes and wants of the family. I am aware, however, of the dangerous nature of such proof, and should not willingly rest upon it, if it did not appear to corroborate the reasonable inferences to be drawn from the written testimony in the case.

I do not perceive any ground for a distinction between the case of the estate generally, and the *Cole* and *Glover* lots. If any trust exists as to them, distinct from what is attempted to be established as to the rest of the estate, it is a trust by implication or operation of law, and such a trust cannot be made out but by showing the actual payment of the money by the *cestui que trust*, or an actual loan by him for that purpose; and in this case no such payment or loan is pretended. The mere charge of the payment to the third person who sets up the trust will not be sufficient; and actual payment, or an actual loan of the money *at the time*,

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and not subsequent to the purchase, is indispensable. (2 *Johns. Ch. Rep.* 409.) "If you merely employ a man by parol," says Mr. *Sugden*, "to buy an estate for you, although he buy it accordingly, yet if he hold himself out as the real purchaser, and no part of the purchase money was paid by you, you cannot compel him to convey the estate to you, because that would be directly in the teeth of the statute of frauds." And if the entry in the account communicated to *Mark Steere*, in 1814, be assented to as evidence in writing of a trust, it is no longer the case of a resulting trust, but rests precisely upon the same ground with the general trust set up by the bill, and must partake of the same fate.

I am, accordingly, of opinion, that the bill cannot be sustained, because,

1. The plaintiffs, upon their own showing, have a remedy at law for the land possessed by the defendant *Richard Steere*, inasmuch as neither the sale nor the sheriff's deed contained any description or location of the land sold.

If, however, the plaintiffs, or the testator under whom they hold, may be considered (and I think he may justly) as having waived that objection, and as having affirmed the sale, by repeated acts, then,

2. The plaintiffs have not made out a trust sufficiently clear and certain, to enable this Court to act upon it, and to take the case out of the statute of frauds.

Bill dismissed without costs.

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GILLESPIE and others, *executors* of Gillespie, *against* MILLER.

GILLESPIE v. MILLER.

A gift for life of a chattel, is a gift of the usufruct only, except as to such articles, the use of which consists in the consumption: and there may be a limitation over by will, of a chattel interest, after a life estate therein.

As where a testator devised his house and lot to his wife, *also* all his *personal* property, and also the rents and profits of his house and farm at *N.*, for her support during her natural life; and after her decease, gave and devised the same to his brother *S.*, in fee, chargeable with certain legacies: *Held*, that the wife took the *use* only of the *personal* estate, which after her decease went to *S.*, the brother of the testator.

THE bill was filed by the plaintiffs, as executors of *Samuel Gillespie*, the brother and residuary legatee of *William Gillespie*, deceased, against the defendant, as the surviving executor of *William Gillespie*, for an account of the personal estate, &c. The will of *William Gillespie* was dated *February* 13, 1813; and the material parts of it were as follows: "First, I give and bequeath to my beloved wife, *Mary Gillespie*, my house and lot in *Smith-street*, in the village of *Newburgh*, &c. *Also*, I give to my said wife, *Mary Gillespie*, all my personal property which shall remain, after paying funeral charges and other expenses; *also*, the yearly income, arising by rents from and out of my house and farm at *Neely Town*, for her support during her natural life, she making no waste or destruction thereupon; *and after her decease*, I give and devise the same to my brother *Samuel Gillespie*, and to his heirs, &c. enjoining him or his heirs, in consideration thereof, to pay the following sum or sums of money as legacies," specifying the particular legacies. *October 26th.*

The testator made his wife *Mary Gillespie*, his brother *Samuel Gillespie*, and the defendant, executors of his will. The widow, and the two other executors all qualified; and the widow took possession of the personal estate, which she assigned and delivered to the defendant, in consideration hat he would allow her a certain annuity for life. She

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died soon after, and the defendant cliamed to hold the property as his own.

The only question in the cause which arose on the construction of the will of *William Gillespie* was, whether the widow took an absolute estate in the personal property, or only the use of it during her natural life.

B. Robinson, for the plaintiffs.

J. Radcliff, for the defendant.

THE CHANCELLOR. The language of the will is perfectly clear and definite. The respective devises and bequests to the wife, are all connected by the word *also*, and subject to one and the same limitation. The testator devises to her his house and lot in the village of *Newburgh; also*, all his personal property, *also*, the rents and profits of his house and farm at *Neely Town;* and *after her decease, he gives and devises the same to his brother, Samuel Gillespie, in fee, chargeable with certain legacies.* There seems to be no room for any other construction. The law admits of a limitation over by will of a chattel interest, after a life estate in the same. A gift for life of a chattel, is a gift of the usufruct only, and the only exception to the rule seems to be in the case of such articles as corn, hay, &c. of which the use consists in the consumption. (3 *Vesey*, 311. 3 *Merivale*, 194, 195.) When the defendant accepted of an assignment and delivery of the personal estate of the testator, from the widow, he accepted it with knowledge of the will, for he was one of the executors.

I shall, accordingly, direct a reference to a master, to ascertain and report the amount of the personal property so assigned to the defendant, and shall decree that he account for the same, with interest from the death of the widow, for such part thereof as may have been converted into money, after making all necessary allowances for what may have been appropriated by the defendant for her support.

Order accordingly.

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HUNTINGTON and MUMFORD *against* HAVENS and others.

HUNTINGTON v. HAVENS.

A general recital in a deed does not conclude a party, though the recital of a particular fact may estop him.

A recital cannot control the plain words in the granting part of a deed.

As where a deed of assignment by a debtor in trust for his creditor, recited that the debtor was desirous to convey his property, to secure three of his creditors named, in full, and the residue for the benefit of his other creditors; and in the body of the deed, the assignment was expressed to be in trust, to pay and satisfy those three creditors and three others named, and the surplus to be divided among his other creditors: *Held*, that the three creditors named in the recital were only entitled to be paid rateably with the other three creditors, in proportion to their demands, out of the proceeds of the property so assigned.

THE bill, dated *March* 13, 1820, stated, that on the 16th of *June*, 1819, *Frederick Jenkins* and *Matthew Jenkins* became insolvent. That the plaintiffs were their confidential creditors to a large amount, which was specified; that the defendants also claimed to be confidential creditors. That *Frederick* and *Matthew Jenkins* being desirous first to pay their confidential creditors, and then such other creditors as should come in and accept the residue in satisfaction, did, on the 17th *June*, 1819, execute and deliver to the three defendants, *P. Havens*, *J. Lovett*, and *J. C. Coddington*, first named, an indenture tripartite, which was set forth in the bill, and the material parts of which are stated in the opinion delivered by the Court. That it was the original intention of the parties to the said indenture, that the plaintiffs and five defendants should be placed on an equal footing, with regard to the payment of their debts. That on the 19th *June*, 1819, for the purpose of further securing their confidential creditors, another indenture was executed between *Frederick Jenkins* of the one part, and the three defendants first named of the other part, reciting the former

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indenture, and that the grantors were desirous of securing to the plaintiffs and defendants a full indemnity, &c. That these indentures were executed by the parties, and under them the three defendants first named had collected debts, and taken possession of the property assigned, and converted it into money: that the three defendants had paid the defendant *Coddington* his dividend of the proceeds, on the principle of an equal distribution, and had, in various letters, recognized the right of all the confidential creditors named, parties to the suit, to come in and receive equal dividends, according to their respective claims. But that the three defendants first named, since, and now pretend that they are entitled to priority of payment, and that the plaintiffs were not entitled to payment, until the four first defendants were satisfied. That those claims are sufficient to absorb all the property assigned. That if the indentures will bear the construction set up by the defendants, it has originated in a *mistake*, which ought to be rectified: *Prayer* that an account be taken of the real and personal estate so assigned, and of the proceeds received by the three first named defendants; that the same be paid into Court, or some proper person be appointed to receive the same; and that the plaintiffs be paid out of the same their just demands, &c.

The defendants having put in their answers, proofs were taken in the cause, and several witnesses examined for both parties.

G. Griffin and *S. Jones*, for the plaintiffs. They cited 1 *Ridgeway's P. C.* 384. 449. 461. 3. *Ch. Cas.* 101. *Shep. Touchst. tit. Deeds.* 2 *Johns. Ch. Rep.* 222. *Cowper*, 319.

Wells and *T. A. Emmet*, contra. They cited *Willes' Rep.* 9.

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THE CHANCELLOR. The point in controversy in this case is, whether the plaintiffs are not entitled, under the assignments of the 17th and 19th of *June*, 1819, to an equal participation with the defendants, in the proceeds of the assignments.

On a careful perusal of the deeds, and of the proof which has been furnished in the cause, I cannot entertain a doubt, either as to the true construction of the deeds, or as to the real intention of the parties to them, even if that intention was to be deduced from testimony *dehors* the deeds.

The indenture of the 17th of *June*, 1819, was between *Frederick* and *Matthew Jenkins*, of the first part, the creditors mentioned in the schedule B, annexed to the deed, and who should become parties to the deed, by signing and sealing the same, upon the terms and within the time mentioned therein, of the second part, and the defendants, *Havens*, *Lovett*, and *J. J. Coddington*, of the third part. The recitals to this deed stated, that *Frederick* and *Matthew Jenkins* had failed, and that they were "indebted to the parties of the second part, in considerable sums, and in large sums to the parties of the third part." "And they were willing and desirous to convey their property, (designated in the schedule A, annexed,) in trust, to secure the parties of the third part, to the full amount of their demands and responsibilities, and to divide the residue or surplus for the benefit of the parties as afterwards expressed." The deed then grants, conveys, and assigns, to the parties of the third part, the property in schedule A, in trust, to sell the same and convert it into money, and collect the debts, and then, after deducting all necessary expenses, &c. "to pay to *Philetus Havens*, *James Lovett*, *J. & J. Coddington*, *Gurdon S. Mumford*, *Benjamin Huntington*, and *Richard Lambert*, such sums of money as the said parties of the first part may owe to them respectively, or as may be necessary to indemnify them, or either of them, against any responsibilities or assumptions

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whatsoever, which either of them have made, or come under for, or on account of the said parties of the first part." The deed then proceeds, "and in the third place, upon the further trust out of the surplus or remainder of the said moneys, to make division thereof among *the other creditors* of the said parties of the first part, who shall execute the deed within the time, &c. equally in proportion to their debts," &c.

This deed was signed and sealed not only by the grantors, but by all the defendants, except *Joseph Coddington*, and also by the plaintiffs.

After so clear a manifestation of the specific trusts, and of the preference given to the parties to this suit, *by name*, over the general creditors, and of the equality which is preserved between these parties, there seems to be no room for the presumption set up by the defendants, that they are to be paid to the full amount of their demands, in preference to the plaintiffs, and in exclusion of the plaintiffs, if the trust property should prove, as it has proved, to be insufficient. A general recital in a deed will not conclude a party, though a recital of a particular fact may estop. (*Co. Litt.* 352. *b.* *Roll. Abr.* p. 872. *Willes' Rep.* 9.) The recital in this deed is general and loose, and by no means to be considered as necessarily repugnant to the granting part and to the declared trusts. If the plaintiffs were to be excluded from the benefit of the clause giving to them and the defendants a priority to the general creditors, they would be excluded altogether from the provisions of the deed, as to the surplus, for that was to be divided rateably "among the other creditors," which plainly excluded those which had been named. The plaintiffs are put upon an equality with the defendants, and there is no distinction made, or which can be deduced from the trust, or declared in their favour. If the recital in the deed be in any respect repugnant to this equity, as between the parties to this suit, it cannot be permitted to con-

trol the operation of the deed. This is a well settled rule of construction, and there never was a case in which a recital controlled the plain words of the granting part of a deed.

In *Bath* and *Montague's case*, (3 *Ch. Cas.* 101.) Lord Ch. J. *Holt* very fully declares this rule: "This deed," says he, "doth say it was made and intended to confirm the will, and yet makes several recitals and limitations contrary to it. Why, suppose it were, that it did recite the will truly, and said the will disposed of the estate so and so, and then adds, that it was made to confirm the will, but yet disposeth of the estate quite otherwise than the will doth, shall this avoid the deed in equity, or make it to have another consideration than it else would have? The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention or meaning of the parties, but it hath no effect of operation. But when it comes to limit the estate, there the deed is to have its effect according to what limitations are therein set forth."

It is to be observed, that Lord *Holt* spoke in this manner while sitting in Chancery, and the Lord Keeper affirmed what he said, and observed, that "recitals in a deed are not made the measure of the limitations in it."

The defendants, by becoming parties to this deed, (and they admit they did about the day of the date of it,) are presumed to have read it, and to have acceded to the terms of it; and there is a remarkable circumstance appearing upon the face of the deed, that must have fixed their attention. The name of the plaintiff *Mumford* is interlined in that part of the deed in which he is declared to be one of the *cestui que trusts* to be first paid, and this interlineation is duly noticed by the subscribing witness. The defendants have therefore emphatically recognized the deed, according to its obvious and legal operation, and admitted the plaintiffs to be equal sharers with them in the privilege conferred. If there was any agreement between them and the grantors, that they were to be *exclusively* preferred, the plaintiffs were

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no parties to that agreement, and are not to be affected in their rights by a transaction *inter alios*. But there is no evidence of any such agreement, and the defendants appeared always to have admitted the equal rights of the plaintiffs, until they received the advice of counsel as to the effect of the recital.

The defendants admit, that the second deed of assignment to the defendants, *Havens*, *Lovett*, and *J. J. Coddington*, was executed on the 19th of *June*, 1819, "for the purpose of further securing the persons therein named as confidential creditors." And this assignment refers to the former one, and recites that *F. Jenkins* was "desirous to secure to the said *Philetus Havens*, *James Lovett*, the firm of *J. & J. Coddington*, *Gurdon S. Mumford*, *Benjamin Huntington*, and *Richard Lambert*, a full indemnity against any payments which they, or either of them, may be subjected to, by reason of debts owing, or responsibilities assumed, by them, or either of them, for or on account of *F. Jenkins* and *Matthew Jenkins*, in case the property and estate assigned by the said indenture should be insufficient for that purpose." This second deed, taken in connexion with the other, shows, demonstrably, its meaning and intention to have been conformably to the construction which has been given to it. And if we resort to the evidence which has been produced *dehors* the deeds, it is proved most decidedly by the testimony of *Frederick Jenkins*, and of *Lawrence*, who drew the former deed, that the intention, in the view and understanding of all the parties to it, was to place the plaintiffs on the same equality with the defendants, and that they were to be equally entitled to be preferred as confidential creditors.

I shall accordingly declare that they are entitled to receive from the defendants, who were the trustees in the deeds, their equal and rateable proportions with the defendants of the property assigned, and that a reference be had to take and state an account of the estate assigned, and of

the proceeds which have or might have come to the hands of the trustees, and after making all just allowances, that the amount of the dividends rateably due to the plaintiffs, and arising from the balance to be ascertained, be stated.

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Decree accordingly.

CHESTERMAN *against* G. and W. GARDNER.

A party has no remedy in this Court on the mere ground of a failure of title, if he has taken no covenants to secure the title, and there is no fraud in the case.

Where the defendants *G.* and *W.*, the one by the purchase of a mortgage, and the other by the purchase of the equity of redemption, became possessed of the whole estate, and leased it to the plaintiff for a term of years, and *G.* afterwards assigned the mortgage with notice of the term: *Held*, that the assignment was not a fraud on the plaintiff; and though the property was afterwards sold on a bill for a foreclosure filed by the assignee, and the term thereby merged in the inheritance, yet as the plaintiff himself became the purchaser at the sale under the decree, he thereby waived all right, if any he had, to relief, for the damages he may have sustained by the loss of his term.

The fraud, in such cases, which will entitle a party to relief, is a fraud at the time of the execution of the deed or lease to the plaintiff, and not fraud in a subsequent and distinct transaction.

The possession of a tenant is notice to a purchaser of the reversion, of the actual interest of the tenant, and of the extent of that interest; and the purchaser is bound to admit every claim of the tenant which he could enforce against the vendor.

BILL, filed *October* 12th, 1819, stated, that on the 2d of *July*, 1817, the defendants, for the consideration of 3,000 dollars paid to them, leased to the plaintiff a house and lot,

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in the City of *New-York*, for the term of nine years, from the 1st of *May*, 1817. The lease contained a covenant on the part of the defendants, for quiet enjoyment during the term. At the time the lease was executed, the defendant *W. G.* was the assignee of a mortgage on the premises, which was then unknown to the plaintiff; and *G. G.* had purchased the equity of redemption of the premises under a sale thereof, on execution; so that the title thereby became united in the two defendants. That, afterwards, during the term, in *October*, 1818, *W. G.*, to injure and defraud the plaintiff, assigned the mortgage to *N. Wells*, who on the 13th of *March*, 1819, filed a bill to foreclose the equity of redemption, and obtained a decree in this Court for the sale of the premises; and upon such sale the plaintiff became the purchaser. That the premises so sold contained twenty feet of additional ground. That before this foreclosure, the plaintiff had expended 2,000 dollars, in improvements on the premises, which sum, as well as the 3,000 dollars paid for the lease is now lost by such foreclosure and sale; and that the plaintiff cannot recover any part thereof at law, on the covenant for quiet enjoyment, contained in the lease. That the defendant *W. G.* ought to have assigned the mortgage subject to the lease, or secured the lease, so that the plaintiff could not be deprived of the benefit of it; or the defendant *G. G.* ought to have redeemed the premises, or the defendants together should have protected the plaintiff from the loss he has sustained, by the mortgage, and the foreclosure and sale under it, by which the lease was wholly extinguished. *Prayer*, that the defendants may come to an account with the plaintiff concerning the losses he has sustained, by being deprived of the benefit of his lease, and be compelled to pay to him his damages, &c.

The defendants, in their answer, denied that the mortgage was unknown to the plaintiff; or that it was assigned to injure the plaintiff; but that the same was assigned to *Wells*, with notice to him of the lease to the plaintiff. That

the defendants had a right to sell their respective interests in the mortgaged premises, and that the sale could not impair the term of the plaintiff; and they averred that the plaintiff had sustained no loss. That the plaintiff attended the sale under the decree of foreclosure, and endeavoured to depreciate the title of *G. G.*, stating that there was a claim of dower, and giving notice of his term for nine years, and declaring that it would remain good; and so the plaintiff thereby purchased for several thousand dollars less than the price at which the premises would otherwise have sold; and has, therefore, forfeited all right, if any he had, against the defendants.

The cause having been put at issue, witnesses were examined on both sides. The material parts of the evidence are stated in the opinion of the Chancellor.

The cause was brought to a hearing on the 14th of *November* last.

Wallis, for the plaintiff.

H. W. Warner, for the defendants.

THE CHANCELLOR. There is no sufficient ground disclosed in this case for the interference of the Court.

The defendants leased a house and lot, in the City of *New-York*, to the plaintiff, for nine years, for the sum of 3,000 dollars, which was paid. The lease contained a covenant on the part of the defendants for quiet enjoyment during the term. At the date of the lease the defendant *W. G.* was assignee of a mortgage upon the premises, and the defendant *G. G.* was assignee of the equity of redemption, and between them both united the title. Pending the lease, the defendant *W. G.* assigned the mortgage to *N. Wells*, who filed a bill to foreclose the equity of redemption, and there was a decree of foreclosure and sale, and the plaintiff became the purchaser, and merged his term in the fee.

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1. There being no actual eviction or ouster, the plaintiff has no remedy at law, under his covenant for quiet enjoyment. The case of *Waldron* v. *M'Carty*, (3 *Johns. Rep.* 471.) is in point. Nor can he have any remedy in this Court, on the mere ground of a failure of title, if he has taken no covenants to secure the title, and there be no fraud in the case. The cases to this point were referred to in *Abbot* v. *Allen*, (2 *Johns. Ch. Rep.* 522, 523.) and they appear to be very clear and explicit. Whether there be any implied covenants in the lease which are not so inconsistent with the express covenant for quiet enjoyment, but that they may exist notwithstanding the express covenant, I have not thought it necessary even to examine, for whatever remedy for damages exists under covenants, express or implied, belongs to a Court of law, and not to this Court. The only relief here on the ground of the failure of title, is fraud: Though fraud be charged in the bill, it is denied in the answer, and there is no positive proof of it, and it is left to be inferred, if inferred at all, from the simple fact that the defendant *W. G.* did afterwards assign the mortgage to *Wells*, and that *Wells* foreclosed the equity of redemption of *G. W.*, who was unwilling or unable to redeem. But I do not think that the mere assignment of the mortgage by *W. G.* to *Wells*, was, of itself, an act of fraud upon the plaintiff. He avers, in his answer, that *Wells* took an assignment of the mortgage with notice of the lease, and that fact of notice is sufficiently in proof. *Wells* testifies, that "he understood from the defendant *W. G.* that the premises were leased to the plaintiffs, and that they were leased either by the defendant *W. G.*, or by him and his father, *G. G.*, jointly," and prior to the assignment of the mortgage to *Wells*, he was with his partner authorized by the defendants to receive the rents from the plaintiffs; and the rent payable on the 1st of *May*, 1817, was received by his partner on the 5th of that month, and a receipt in the partnership name given. After this, it

lay not in the mouth of *Wells*, to deny notice of the term when he became an assignee of the mortgage; and certainly fraud cannot be imputed to the defendant *W. G.*, by the act of assignment. It is, besides, a rule of equity that the possession of a tenant is notice to a purchaser of the reversion, of the actual interest of the tenant and of the whole extent of that interest, and he is bound to admit every claim which could be enforced against the vendor. (*Daniels* v. *Davison*, 16 *Vesey*, 249.)

There is as little colour for the inference of fraud, in the defendant *G. G.*, in suffering the equity of redemption to be foreclosed. It is not to be supposed that because he was unable to redeem a mortgage, and because he had no just defence to make to the bill of foreclosure, that he thereby meditated fraud in fact upon the plaintiff. But the fraud which, in these cases, is to afford relief, means fraud at the time of the execution of the deed or lease: The cases do not refer to subsequent and distinct transactions, which do not affect or impair the good faith which was felt and intended, when the deed was executed.

2. The plaintiff, by becoming the purchaser at the master's sale, and merging his term in the inheritance, has deprived himself of all remedy for any alleged failure of title, for it has become impossible to ascertain the damages which he claims. It is in proof that the plaintiff was very busy at the sale, throwing doubts and difficulties over the title, and that he intimated, that "whoever bought the premises must expect to take subject to his lease." The master says, that the lot was sold by him free of all incumbrances, and not subject to any right of the plaintiff. This was no doubt the formal declaration and intention of the master; but have we not just reason to believe, that the plaintiff's suggestions and pretensions did lessen the bids, and that he is now enjoying, in a greater or less degree, the benefit of his lease, and the value of his own previous improvements? I have no doubt of the fact; and that if he was now to be

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paid for his improvements, and for the value of the lease, as he contends for, he would be receiving from the defendants an unconscientious remuneration. If the plaintiff meant to rely upon his covenant, and to seek indemnity from the defendants, he should not have voluntarily speculated at the sale, and mingled his term and the inheritance together, and thereby rendered it impossible for us to tell what damages, if any, he has sustained. How do we know that he would have been evicted, when *Wells* purchased with notice of his term, and when every purchaser at the master's sale, according to the doctrine already referred to, would have taken subject to the like notice and when as a matter of fact his lease was publicly known? Every assignee of a mortgagee with notice of his leases, is bound in equity by those leases equally with him; and there can be no doubt that *Wells* could not have evicted the plaintiff under his assignment of the mortgage. He was as much bound after purchasing with notice of the lease, as the lessor himself. He could not have disturbed the plaintiff, and if he had become the purchaser at the master's sale, he would have been equally bound. The plaintiff elected to purchase himself, and certainly with notice of his own lease, and with his own declaration that the purchase was subject to it. He comes therefore into this Court without any colour of equity to ask for indemnity for the loss of his lease. He purchases, through the means of the decree, from *Wells* the assignee of *W. G.*, and thus the plaintiff may be said to have voluntarily accepted and paid for a release, of the inheritance derived from his own lessor. And can he now come upon the lessor for damages for that sale? By becoming a party to the sale, he has waived all right and title to relief.

On either of these two grounds, therefore, I conclude that the bill ought to be dismissed.

Bill dismissed without costs.

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BURNET v. DENNISTON.

BURNET and others *against* DENNISTON and others.

Where a subsequent judgment or mortgage creditor offers to redeem, the mortgagee cannot *tack* a debt due to him from the mortgagor, secured by another mortgage, on different property, nor any other debt which is not a charge upon the premises sought to be redeemed, and of which such subsequent judgment or mortgage creditor was not bound to take notice.

Where a mortgagee takes a release of the equity of redemption from the mortgagor, by a deed containing a full consideration, and with full covenants, the mortgage debt is considered as merged in the estate, and satisfied by the purchase, unless there be very precise proof to the contrary; and more especially where no claim is set up for more than six years after the purchase.

Where a subsequent judgment or mortgage creditor tenders to a mortgagee the full amount of the debt and interest, due on a prior mortgage, with his costs and charges, which he refuses to accept, unless another debt due to him from the mortgagor, not charged on the premises, is also paid; but proceed, to sell the land, under the *power* of sale contained in the mortgage, such sale is irregular and void.

Where the *advertisement* of sale of mortgaged premises, under a power, states a false assertion, as that the premises are to be sold for default of *three* mortgages, when they were only *two*, the third being on other land, by which the public might be misled, or purchasers deterred from bidding, the sale will be irregular and void.

So, if no *place* of sale is designated in the advertisement, or if the mortgagor was not twenty-five years of age when he executed the mortgage, a sale under the power will create no bar to the equity of redemption under the statute.

Where *J. S.* devised lands to *B.* for life, remainder to *C.* in fee, but *if he died without an heir*, then to *D.* in fee: *Held*, that the devise over could not take effect as an *executory devise*, but created an estate tail, which, by the statute, was turned into a fee simple absolute.

THE bill, filed 13th of *January*, 1813, by *Robert B. Burnet*, *Samuel Finley*, *John M'Lean*, and *John M'Cloughry*, stated, that *John M'Cloughry*, one of the plaintiffs, being seized in fee of a remainder in fee of a lot of land, of which

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his father was tenant for life, at *Little Briton*, in *New-Windsor*, containing 70 acres, on the 15th of *March*, 1796, executed a mortgage to *George Denniston*, to secure the payment of 187 dollars and 50 cents, and on the 15th of *July*, 1801, another mortgage to the same person of the same land, to secure the payment of the further sum of 125 dollars; and which were the only mortgages ever executed by him of the premises. The plaintiffs first named purchased a judgment docketed prior to the 2d of *October*, 1801, against *John M'C.* for 68 dollars and 73 cents, who duly assigned the same to them. The assignees of the judgment, who had performed services, and advanced money to *John M'C.*, soon after the assignment, agreed with him that he should convey the land in fee to them, and that they should hold the same in trust, to pay themselves for their services and advances made, and for such further advances as might be made, with interest; and that they should redeem or purchase the said two mortgages, and reconvey the premises to him, on being reimbursed all such demands and advances, with interest, &c. That in pursuance of this agreement, *J. M'C.* conveyed the premises to them, the said three plaintiffs, in trust, and subject to the mortgages, &c. That the father of *J. M'C.* died in *March*, 1802, and the farm became vested in the said three plaintiffs. in trust, &c. That the mortgagee having advertised the land for sale, on default of payment, under the power contained in this mortgage, and a certain other mortgage mentioned in the advertisement, but to which the plaintiffs allege the land was not subject, the three plaintiffs first named, with the advice of *M'C.*, offered *G. D.* to pay the mortgages upon the said land, and requested an assignment of the mortgages to them. That on the 11th of *March*, 1803, before the day fixed for the sale, the three plaintiffs first named, tendered to *G. D.* the sum of 434 dollars and 20 cents, being the amount due on the two mortgages, with interest and costs, and charges;

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and that he then had notice that the three plaintiffs were possessed of the equity of redemption, as assignees by deed, and of the judgment; but that *G. D.* refused to accept the money and assign the mortgages, pretending that a certain other mortgage, dated 27th of *November*, 1792, given to him by *J. M'C.*, to secure 62 dollars and 50 cents, and a book debt due to him by *Mary M'C.*, grandmother of the plaintiff, were charges on the land; and that he was not bound to submit to a redemption of the premises, until those demands were also paid. The plaintiffs charged that the third mortgage was on eleven acres of land in a different place, and had never been made a charge upon the lands first above mentioned; and had been satisfied by a release from *M'C.* the plaintiff, to *G. D.* of the equity of redemption, in satisfaction of the debt in that mortgage; and that, at any rate, these demands were not binding on the three plaintiffs first named, as judgment creditors and assignees of the two first mortgages, without notice of any such lien or charge, and seeking to redeem. That *Mary M'C.* died upwards of twenty years before the tender above mentioned, and that by omitting to claim the debt for all that time, *G. D.* had waived all right to claim it as a charge on the land, even if it had not been actually paid, but which they alleged to be the fact. That *G. D.* persisted to expose the land for sale, and it was sold at auction; and was struck off to *W. G. D.*, the son of *G. D.*, for 10 dollars; and *G. D.* gave to the defendant, *W. G. D.*, a conveyance of the land in fee. That in *March*, 1803, *G. D.* and *W. G. D.* took possession of the land, and continued in possession thereof until the death of *G. D.*, and that his executors, or *W. G. D.* are now in possession. That *W. G. D.* purchased with notice of the matters above stated, and that the *advertisement* for the sale of the land was not pursuant to the act, but irregular and void; that notice of the place of sale was not given, and the advertisement and sale professed to be grounded on the *three* mortgages, when the third mortgage did not include the land described in the

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other two mortgages; and that neither of the mortgages contained a competent *power to sell*, under the statute, and that the powers were never recorded in the office of the clerk of the county. That the plaintiff, *M'C.*, was under twenty-five years of age when he executed the *third* mortgage. *Prayer*, for an account of rents and profits, &c. and to redeem.

The answer of the defendants was filed *June* 29, 1815, and *John M'Cloughry*, one of the plaintiffs, dying in *September* following, intestate, and without issue, a bill of revivor was filed, *July* 6, 1816, making his brothers and sisters, who with *James M'C.*, his nephew, were stated to be his heirs at law, plaintiffs, and *James M'C.* was made defendant; he having refused to join in the bill, claiming the whole property in fee, alleging that the intestate derived his title to the land from his grandmother, who devised it to her son, *J. M'C.* the elder, for life, and then to the said *John M'C.* the intestate, in fee, but *if he died without an heir*, then the land should go to the said *James M'C.*, in fee.

The other defendants answered the bill of revivor, admitting the facts therein stated, and leaving the question open as to the title of *James M'C.* As against *James M'C.* the bill was taken *pro confesso*.

The answer to the original bill admitted the mortgages; that on the 28th of *May*, 1796, the plaintiff, *John M'C.*, in consideration of 183 dollars, conveyed to *G. D.* in fee, (by a deed containing full covenants and warranty) the lands mentioned in the third mortgage, being two pieces of land derived under the will of his grandfather, containing 11 acres, and a garden spot, in *New-Windsor*, and which deed was recorded the 29th of *July*, 1801; that the twenty-five pounds, or 62 dollars and 50 cents, for which the said mortgage was given, remained unpaid, with the interest; that the said *John M'C.* refused to convey, unless the full consideration was paid, and refused to deduct the mortgage debt; that the whole consideration was accordingly paid to him, and he

agreed that the 62 dollars and 50 cents and the interest should become a charge on the premises covered by the two first mortgages, and the third mortgage, therefore, remained uncancelled. That each mortgage contained the usual power of sale, and *G. D.* under the power, in all the mortgages, in *September*, 1802, advertised the land comprehended in the two first mortgages. The defendants then stated the sale and conveyance to *G. D.*, &c. They admitted the judgment, but denied any knowledge of its being assigned, and supposed that it had been paid; they denied any knowledge of advances to *John M'C.*, or of the agreement stated in the bill, or the release to the other plaintiffs. They did not admit that the land became vested in the three first named plaintiffs in *trust*, nor the tender and refusal as charged, or that *G. D.* knew of any grant or assignment to the said plaintiffs, or of the judgment as charged, or that the equity of redemption was in them; and they alleged that the debt mentioned in the third mortgage remained due; and that *G. D.*, at the time of the sale, had a demand against *John M'C.* for a debt of his grandmother, *Mary M'C.*, for board and money expended, amounting in 1779, to 144 dollars and 48 cents; that she died at the house of *G. D.*, who paid her funeral expenses, and she left no sufficient personal estate to pay him that debt. *W. G. D.*, the defendant, denied that he had any notice, when he purchased, that the land had been conveyed to the three first named plaintiffs, or that they were assignees of the judgment, or that they were ready, or offered to redeem. The defendants said, they believed that *John M'C.* was twenty-five years old, when he gave the last mentioned mortgage, in 1792, &c.

The cause having been put at issue, witnesses were examined, and evidence taken on both sides. The material facts proved, are stated in the opinion delivered by the Court.

October 26, 1820. The cause came on to be heard this day.

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S. Jones, for the plaintiff.

J. Radcliff, contra.

January 1.

THE CHANCELLOR. The three first plaintiffs and the heirs of *John M'Cloughry*, who was one of the plaintiffs in the original bill, seek to redeem the premises, being about 70 acres of land purchased and possessed by the defendant *W. G. Denniston*. Those three plaintiffs claim to be judgment creditors of *John M'Cloughry*, the mortgagor, by virtue of an assignment of a judgment of *J. Goldsmith*, against *John M'C.*, and they claim to be subsequent mortgagees, by virtue of a deed to them from *John M'C.*, of the 70 acres, and a certificate from them that the land was to be released on the payment of 111 dollars, with interest. Under this title they attempted to redeem those premises by a tender to *George Denniston*, the mortgagee, of the amount due on the two mortgages to him from *John M'C.*, and of the costs and expenses of advertising the land for sale under a power contained in the mortgages. There is no dispute as to the fact of the tender, and of the requisite amount, prior to the sale, and of the refusal by *G. D.* to accept the money and suffer the redemption, except upon the condition of paying another mortgage of *John M'C.*, to him upon other land, and a book debt against a grandmother of the said *John M'C.* The condition was not acceded to, and *G. D.*, the mortgagee, sold the land to his son the defendant *W. G. D.* for 10 dollars, who took possession, and has held the land to this time.

There can be no doubt that the plaintiffs who made the tender were entitled to redeem, and that the condition imposed by *G. D.*, was unlawful and unjust. The further claims set up by *G. D.* if well founded against *John M'C.*, were not a charge upon the mortgaged premises, or such, of which these plaintiffs, as subsequent incumbrancers, had notice, or were bound to regard. The mortgage had no

right to tack another debt secured by a mortgage upon other lands, to the two mortgages sought to be redeemed by a subsequent judgment and mortgage creditor. And there is good reason to conclude that the claim under the mortgage on other lands had been already extinguished, for *G. D.* had purchased, in 1796, and about three years and a half after the date of the mortgage so interposed, the equity of redemption from the mortgagor himself to the lands so covered by the third mortgage. The deed under which he took the equity of redemption was with full covenants, and contained a consideration expressed of £73 4*s.* when the original mortgage debt thereon was only £25. Without very precise proof to the contrary, (and we have none,) the presumption is, that the parties intended that the charge should merge in the estate, and was settled when the purchase was made. The presumption is stregthened by the fact, that from 1796, when the equity was purchased, down to *March*, 1803, when the claim was set up against the plaintiffs, the case is silent as to any demand or notice of that debt. There is equal reason to conclude that the book debt claimed, was not a subsisting debt even against the estate of *Mary M'Cloughry*. It was a debt of the date of the year 1779, when *Mary M'C.* died, and twenty-five years before the tender; and *G. D.* was her executor and son-in-law, and as we have no account of his administration, the presumption is, that the book debt, if true originally, was satisfied by him out of her personal estate, for it is in proof that she possessed personal estate.

The obstacles to a redemption set up by the mortgagee, *G. D.* at the time of the tender, were accordingly unlawful and groundless, and rendered the subsequent sale irregular and void.

Nor can the defendant, *W. G. D.*, be entitled to protection as a *bona fide* purchaser, without notice. It is in proof by two witnesses, that the plaintiffs, or one of them, was present at the sale, and in the presence of the defendant, *W.*

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G. D., forbade the sale, and stated publicly the right of the plaintiffs, and the fact of the tender. The defendant, *W. G. D.*, was a son of *G. D.* the mortgagee, and bid only the sum of 10 dollars, and the mortgagee insisted as a condition of the sale, that the money on any bid should instantly be paid down. There is very good ground, from these circumstances, to conclude that the sale was colourable merely, and collusive between the father and the son; and the latter is not entitled to the character of a *bona fide* purchaser for a valuable consideration, without notice.

The sale was irregular and void in other respects. The advertisement of sale contained false assertions, and was an imposition upon the public, and a fraud upon the rights of all concerned. It stated, that the 70 acres were to be sold for default of payment of three several mortgages given upon that land, to secure those payments. One of these mortgages was the third one, already mentioned, upon other lands, being 11 acres and a garden spot, and confessedly not the 70 acres in question. There were, therefore, but two mortgages upon the land to be sold. Such a false allegation tended to deceive the public as to the extent of the incumbrances, and to deter purchasers from bidding. Another defect in the advertisement was, that no place of sale was designated, and the public had no certain and authentic evidence, as the statute intended, of the place of sale. It is, likewise, worthy of notice, that the power inserted in the third mortgage thus intruded upon the public, was void, for the mortgagor was not of twenty-five years of age when the mortgage was executed. This is clearly proved. From all these circumstances, the conclusion is clear and irresistible, that the sale creates no bar to the right of the plaintiffs to redeem.

The objection to the title of the plaintiffs as creditors of *John M'C.*, and as legal representatives of *John M'C.*, is without any foundation. He was seized in fee, at the time

of his death, subject to the incumbrances which are stated in the case. The devise of the land was to him in fee, but if he should die *without an heir*, then the land was to go to *James M'Cloughry*, the defendant. These words most clearly created an estate tail, which was turned by our statute into a fee simple absolute. The devise over could not take effect as an executory devise, for *John M'C.* could not die without an heir, living *James M'C.* The limitation over was impracticable and absurd as an executory devise; and besides, it was too remote, and necessarily meant an indefinite failure of issue. The only reasonable construction, and one conformable to settled rules, is to hold it to have been an estate tail, turned by statute into an estate in fee.

I shall, accordingly, declare, that the plaintiffs, who are judgment and mortgage creditors, are entitled to redeem the 70 acres covered by the two mortgages, upon paying the amount due thereon; and that the claim of *G. D.* to set up a mortgage debt upon other lands, and a book debt against *Mary M'Cloughry*, as a condition of such redemption, was unwarranted and unlawful, inasmuch as the case warrants the presumption and conclusion of law, that these debts were paid; and if not paid, the plaintiffs, who were such creditors, and who had no previous notice of them, were not bound to pay them. And I shall further declare, that the sale by *G. D.* was unlawful and fraudulent, because the notice of sale contained a false assertion, that these 70 acres were covered by a third mortgage, which was upon other lands only, and because no place of sale was specified in the notice, and because the power to sell under the third mortgage upon other lands, was, in itself, null and void, and because the sale was made, after a tender of the sum due upon the two mortgages on the 70 acres, with the costs. And I shall further declare, that *W. G. D.*, the defendant, was a purchaser chargeable with notice of the right of the plaintiffs, and of the tender; and even without notice, he would have been a purchaser, under the circumstances of the sale, subject to the right

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of redemption of the plaintiffs; and that *John M'Cloughry*, the original plaintiff, died seized in fee of the said mortgaged premises, subject to the incumbrances chargeable thereon, and that the other plaintiffs are his lawful heirs, entitled to the same rights. And I shall direct a reference to a master, to state and report the amount due on the two mortgages, and the rents and profits which have, or might have been received by the defendant, *W. G. D.*, and the value of the beneficial and permanent improvements now existing, and made by him thereon, and the injury, waste, and deterioration, which he may have committed, or suffered to be done, &c.

Decree accordingly.

ARDEN and others *against* PATTERSON and DE HART.

This Court will set aside an assignment void at law, and necessarily leading to fraud and corruption.

As, where *D.* assigned all his claim and right of action for a certain quantity of wine, against *A.* to *S.*, in trust for the creditors of *D.*, and *P.*, an attorney, who had acquired a knowledge of the grounds of the claim, as attorney, from *D.* and *S.*, purchased the right of action of *S.*, who supposed the chance of recovery desperate, for a trifling consideration, and prosecuted the suit wholly for his own benefit, and recovered a judgment for the whole amount, the agreement and assignment were held to be unlawful and void, on the ground of *champerty*, even though *P.* might be a creditor of *D.*; and on *S.* refunding to *P.* the consideration paid for the assignment, a perpetual injunction was awarded, prohibiting *P.*, or any other person for his use, from proceeding at law to enforce the judgment so obtained by him against *A.*

The decision of a Court of law, on a summary application to its equity, by motion and affidavit, is not such a *res judicata* as will conclude this Court from any inquiry into the case.

Nov. 8, 1820, and *Jan.* 4, 1821.

THE bill was filed *October* 8, 1818, by *Richard D. Arden*, *Daniel Sullivan*, and *Isaac F. Roe*, against *John W.*

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Patterson and *Jacob De Hart*, for the purpose of having a certain assignment by *S.* and *F.* to *D.* for the benefit of *P.*, of a right of action against *A.* declared void and cancelled; and for a perpetual injunction to stay all proceedings under a judgment obtained by *P.* in the names of *S.* and *F.* against *A.*, &c. The material facts in the case are so fully stated in the opinion delivered by the Court, that it is unnecessary to detail the allegations in the pleadings, or the proofs taken in the cause.

November 8, 1820. The cause was this day brought to a hearing.

Harison and *Wells*, for the plaintiffs, made the following points:

1. The contract made by the defendant, *P.*, with *Sullivan* and *Roe*, for their right of action against *Arden*, and the consummation of it by the assignment, are within the statute against *Champerty* and maintenance. (1 *Bac. Abr.* 575. 15 *Viner. Abr.* 158. pl. 28, 29. *Hawkins' P. C. B.* 1 *Ch.* 83. 89. 1 *N. R. L.* 172. sess. 34. ch. 87. s. 1. 3. 7.)

2. That the conduct of *P.*, being an attorney of the Supreme Court, was, under the circumstances of the case, unlawful and oppressive, if not fraudulent, in taking advantage of his professional character and skill, in order to obtain an undue advantage over *S.* and *F.*, in the purchase of their right of action against *A.*, for a consideration grossly inadequate.

3. That the assignment by *P.* and *R.* ought, therefore, to be set aside, and the consideration money paid therefor, remaining in the hands of *G.*, be repaid to *P.*, with the costs of the suit at law, and that *P.* should be perpetually enjoined from proceeding on the judgment against *A.* They cited further, 2 *Atk.* 25. 224. 12 *Vesey*, 199. 1 *Eden's Rep.* 305. 16 *Vesey*, 120. 2 *Madd. Ch.* 356. *Cooper's Rep.* 5. *Doug.* 698. *n.* 1 *Term Rep.* 153.

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T. A. Emmet and *Hoffman*, contra. They cited 4 *Bl. Comm.* 135. 4 *Term Rep.* 340. 2 *Bl. Rep.* 820. 8 *Johns. Rep.* 227. 9 *Johns. Rep.* 60. 3 *Johns. Rep.* 425. 4 *Johns. Rep.* 403. 1 *Johns. Cases*, 51. *Cases Temp. Talbot*, 37. *Cooper's Eq. Pl.* 204. 3 *P. Wms.* 379. 3 *Ves.* 495. *Wyatt's Pr. Reg.* 162. *Mitf. Pl.* 100. *Doug.* 471. *per Buller, J.* 15 *Viner.* 160. A. pl. 38.

January 4. The cause stood over for consideration until this day.

THE CHANCELLOR. The question in this case is, whether the assignment by the plaintiffs, *S.* and *R.*, to the defendant, *De Hart*, in trust for the defendant, *Patterson*, in the summer of 1815, of their demand and right of action against *Arden*, for thirteen pipes of wine, can be permitted to stand?

The facts on which this question turned, are the following:

G. De Peyster, who had deposited thirteen pipes of *Madeira* wine with the plaintiff *A.*, as collateral security for the payment of certain promissory notes made by him and held by *A.*, amounting to 4,000 dollars, having, afterwards, become insolvent, on the 16th *February*, 1811, assigned to the plaintiffs, *S.* and *R.*, in trust for certain of his creditors, mentioned in a prior assignment, which is not produced, all his property, including a demand which he had against the plaintiff, *Arden*, for the value of the thirteen pipes of wine. *De Peyster* testified, that he then owed the defendant *P.* 196 dollars, on a balance of accounts; and he thinks that *P.* was one of the creditors for whose benefit that assignment was made. The assignees immediately brought a suit in trover against *Arden* for the wine; and on the trial they were nonsuited, for want of proof in support of their title, as such assignees, to the wine, and they were subjected to the payment of 351 dollars and 31 cents, for the costs and expenses of the suit. The demand was then given up as hopeless.

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The defendant *P.*, who was an attorney at law, and previously instructed by *De Peyster* in the merits of the controversy relative to the wine, applied to the plaintiffs, *S.* and *R.*, to purchase their right of action against *Arden*. His application to purchase that demand was in the summer of 1815; and he offered to refund their costs and expenses, as the consideration for the purchase; they closed with his proposal, and took his note for the 351 dollars and 31 cents, and at his request made a formal assignment to the defendant, *De Hart*, (who was his brother-in-law, residing in *New-Jersey*,) as his nominal trustee. The defendant *P.* then brought a new suit in trover, in the names of *S.* and *R.*, against *Arden*, for the wine, and as their attorney, but for his own benefit, and at his own risk. In this new suit, the defendant *P.* proceeded, and recovered by verdict, 5,987 dollars and 25 cents, which he now claims as lawful owner. The note that *P.* gave to the plaintiffs, *S.* and *R.*, was sued, and the money collected, and it now remains in the hands of their attorney. This money the plaintiffs offer to return, and to pay the defendant *P.* the costs of the suit. Subsequent to this recovery, the plaintiffs, *S.* and *R.*, being advised that the assignment was fraudulently and corruptly procured by the defendant *P.*, assumed to act as owners of the judgment so recovered, and entered into a compromise and settlement with *Arden* for 2,500 dollars, which they took as assignees for the creditors of *De Peyster*, and acknowledged satisfaction of the judgment. The entry of that satisfaction was, afterwards, vacated by the Supreme Court, upon motion of the defendant *P.*; and the question now fairly occurs, is it proper for this Court, upon these facts, to set aside the assignment to *P.*, and leave the plaintiffs, as trustees, to take the benefit of the judgment, or of their settlement with *Arden*?

This was a purchase by an attorney, for a very small and inadequate consideration, of a matter in litigation, and for

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the very purpose of a renewed litigation. It was a purchase by a person known to the other contracting party to be an attorney, and he knowing that the other contracting parties held the claim merely in trust for the benefit of creditors. The purchase was avowedly made as a matter of speculation, and at a time when this attorney knew, from previous disclosures made to him in his character of attorney, all the facts on which the foundation of the claim so purchased rested, and which created a belief in his mind that the value of the wine could be recovered. Such a purchase, by such an officer, and under such circumstances, cannot be sustained. It is champerty, for the unlawful maintenance of a suit, and the contract was therefore unlawful, as well by common law, as by the statute. The statute declares, (1 *N. R. L.* 172.) that "no officer, or other person, shall take upon him any business that is or may be in suit in any Court for to have part of the thing in plea or demand; and no person, upon any such agreement, shall give up his right to another, and every such conveyance and agreement shall be void." And again; "All persons who move pleas and suits, or cause them to be moved, either by their own procurement or by others, and sue them at their own proper costs, for to have part of the thing in controversy or demand, or part of the gain, shall be adjudged champertors." And "all gifts and conveyances made for maintenance, shall be void." The purchase of a lawsuit by an attorney, in a case like this, is champerty in its most odious form; and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression, and corruption. As a sworn minister of the Courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character, to speculate in lawsuits. The precedent would tend to corrupt the profession, and produce lasting mischief to the community. The knowledge which led to this speculation was acquired by the defendant,

P., as the attorney of *De Peyster*, for *De Peyster* disclosed to him all the facts relative to his dealings with *Arden*, and which led to the deposit of the wine.

A great deal was said, and powerfully enforced, upon the argument, in respect to the usury of *Arden*. Be that as it may, that is not the point before us, nor does it relate to this question of the purchase of the *trover* suit. The conduct of *Arden*, in his efforts to defeat the first suit in trover, likewise occupied much of the attention of the counsel, as did also the efforts of the defendant *P.*, to procure the testimony of *De Peyster*. But I place all those considerations out of view, as having no necessary connexion with the plain and simple question, whether the purchase of the lawsuit by *P.* was lawful, or ought to be permitted by this Court to be available.

This Court will set aside an assignment void at law, and necessarily leading to fraud and corruption.

I have no doubt of the settled jurisdiction of this Court over the case, so far as to set aside an assignment void in law, and necessarily leading to fraud and corruption. This is the peculiar province of this Court, and such a salutary jurisdiction is in constant exercise. In *Strachan* v. *Brander*, (1 *Eden*, 303.) the Lord Keeper ordered a bond, taken by an attorney, to be delivered up as unconscionable, savouring of champerty, and dangerous to public justice. And in *Wood* v. *Downes*, (18 *Vesey*, 120.) it was declared, that an agreement between an attorney and his client could not stand in a Court of equity, upon the doctrine of *champerty*, and as the purchase of a title in litigation, even if the defendant had not been an attorney. There are, also, numerous cases in which, upon principles of policy, the Court will not suffer a contract between an attorney and the client to stand. There would be no bounds, as Lord *Thurlow* observed, to the overruling influence of the power of an attorney, if it were not so. The object of the rule is, to remove the temptation to imposition and abuse, for clients must apply to attorneys for assistance; and, though *S.* and *R.* were not strictly clients of the defendant *P.* at the time of the pur-

An agreement between an attorney and his clients, amounting to *champerty*, cannot stand in a Court of equity.

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chase, yet he came to them as an attorney, and with a knowledge of the merits of the controversy, which he had acquired as an attorney; and there is no evidence, and not even an averment in the answer, that he disclosed to *S.* and *R.* the solid grounds of his hope. The knowledge and skill which he had thus acquired ought to have been employed, if employed at all, strictly in his professional character, for the benefit of those trustees, and not for his own emolument. The purchase, under the circumstances, falls within the principle of the obnoxious dealings between attorney and client.

But it has been observed, that the defendant *P.* had an interest in the suit, as one of the creditors of *De Peyster*, to the amount of his debt of 196 dollars. The evidence is not quite decisive that he was one of the creditors named in the first assignment to *S.* and *R.*, and for whose use the assignment of the wine was also made. *De Peyster* says, that when he stopped payment, he owed *P.* that sum, and that he gave *P.*, as collateral security for the payment of it, a note of one *Baylis*, for upwards of 80 dollars, and twelve and a half shares in the *Washington* Hall stock; and he says further, that the defendant *P.* was not mentioned in the list of his creditors, which he exhibited to the Recorder in *July*, 1811, when he was discharged under the insolvent act; because the defendant *P.* "preferred to abide by the collateral security which *De Peyster* had given him, as before mentioned." This does not look as if he was one of the creditors named in his general assignment in *January*, 1811; and *De Peyster* does not speak with certainty, whether his name was inserted. He only says, "he thinks" his name was inserted. If the defendant *P.* had been one of the original *cestuy que trusts*, why have we not some evidence given by him of his claim between *January*, 1811, and *July*, 1815, for a rateable share of the proceeds of the first assignment, which, he says in his answer, consisted of a schedule of debts and effects, and which assignment he himself drew? What has become of the debts and effects so assigned in trust to *S.* and

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R., and has there been no distribution of them among the creditors who were indisputably named? If the defendant *P.* was one of those creditors, it is to be inferred from the testimony of *De Peyster*, that he had waived his right under that assignment as early as *July*, 1811, when his name was intentionally omitted (and with his consent, for he conducted the proceedings as attorney) in the sworn list of *De Peyster's* creditors. He relied solely on his distinct and separate collateral security, or rather took that security as a satisfaction of his debt; otherwise, his name could not have been honestly omitted in the full and perfect list of creditors required by the insolvent act.

Where an attorney purchases from his client the whole subject matter of controversy, for his own benefit, though he may have had some interest of his own, it is *champerty*.

But admitting that the defendant, *P.*, had still an interest in the assignment to *S.* and *R.*, that interest did not change the nature of the purchase of the suit. Had he assisted in the prosecution for the benefit of his rateable proportion of the dividend of the proceeds, he would not have been liable to the charge of maintenance, and such assistance is all that is intended in the books. It is an assistance given towards carrying on a suit, for the common benefit of those in interest. Here the defendant sued in the character of purchaser of the whole subject matter in controversy, and for his own exclusive benefit. He took it as purchaser for a trifling consideration, and on a speculation of great gain, and with a belief (for so he admits in his answer,) of recovery; and nothing was said or alluded to respecting his *scintilla* of interest in the assignment to *S.* and *R.*: nor was the assignment to him made in satisfaction of a precedent debt, due *bona fide* to him. It was a purchase by him as a stranger; and it is altogether inadmissible for the defendant *P.* now to set up his interest as a pretext for the purchase. That colour or pretence has no foundation in fact, for it was no inducement to the purchase, and the case falls most clearly within all the mischiefs and all the meaning of champerty.

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If the purchase by the defendant was void, yet it is said that it is good as between the parties to it, and is only void as against him who has right. That objection does not apply to this case; for the plaintiffs, *S.* and *R.*, have no right of their own, and do not pretend to any. The whole case admits that they possessed the right of action, as assignees for certain creditors of *De Peyster*, and the suit now brought by them is entirely *en autre droit*, and was to enure to the benefit of these creditors. If the assignment of the right of action to *P.* was void, then the judgment recovered by him in their names belongs to them, and is subject to their disposition as trustees. And as far as this suit is brought for the benefit of the plaintiff *Arden*, and to prevent him from being charged by a person not entitled to the judgment, the objection has no application.

A decision of a Court of law, on motion and affidavit, is not such a *res judicata*, as will conclude another Court from inquiring into the case.

But the question touching the validity of the assignment to *P.*, is said to have been already decided by the Supreme Court, on the motion of the defendant *P.*, to have the satisfaction of the judgment acknowledged by *S.* and *R.*, and entered upon record, vacated. I do not consider the decision of that motion, upon affidavits, to amount to a *res judicata*, which ought to conclude the present inquiry. It could not have been so intended by that Court. We have not the reasons upon which the Court decided, and the decision may have been upon grounds very different from the question of the validity of the assignment. But this objection utterly fails upon the principle adopted by the judges of the Supreme Court, and sanctioned by the Court of Errors, in *Simson* v. *Hart*, (14 *Johns. Rep.* 63.) in which case it was declared, that decisions upon motion and summary application, which do not admit of great discussion, or of being subject to a writ of error, are not final and conclusive so as to amount to a *res judicata*, and a bar to a renewed consideration of the case, in another Court of concurrent jurisdiction.

As to the compromise and settlement of the judgment,

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made between *S.* and *R.* and *Arden*, it does not appear to have any bearing upon the question before me. Whether that settlement was proper and fair, or collusive and a breach of trust, is not to be discussed in this suit. We have not the proper parties in interest before us. It is a question entirely between *S.* and *R.* and those creditors for whose benefit they took the assignment of the wine and the claim upon *Arden*; if they should hereafter bring that subject into discussion, it will then be in time to consider of the validity of that settlement. And I cannot but be of opinion, that the bringing of all these extraneous acts into view, such as the settlement with *Arden*, and the usury of *Arden*, and the efforts of *Arden* to defeat the recovery in trover, by keeping back the witness, and the efforts of the defendant *P.*, to coerce the attendance of that witness by extraordinary means, was entirely useless, as to the great point in the case, touching the validity of the purchase by *P.*; and that if these circumstances were to have any effect, it would be a pernicious one, by distracting the attention, or by exciting prejudices unfavourable to a just and dispassionate consideration of the point.

Decree.

I shall accordingly declare, that the assignment by the plaintiffs, *S.* and *R.* to the defendant *De Hart*, for the use of the defendant *P.*, of their demand and right of action against the plaintiff *A.*, was an unlawful sale and purchase by the defendant, and ought not to be sustained, or the judgment recovered thereon permitted to be enforced, for the benefit of the defendants, or either of them; and that upon payment to the defendant *P.*, or to his soliciter, or depositing with the assistant register for his use, the 351 dollars 31 cents so recovered of the defendant, as the consideration of the assignment, together with the taxable costs of the suit at law, brought by the defendant *P.*, in the name of the plaintiffs *S.* and *R.*, a perpetual injunction issue, prohibiting the defendant *P.*, his agents, &c. or any person for his use, from pro-

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ceeding at law to enforce the judgment so recovered against the plaintiff *Arden*, by execution, *scire facias*, action of debt, or otherwise, and that no costs of this suit be charged by either party as against the other.

Decree accordingly.

BAY *against* CODDINGTON and others.

A person receiving negotiable paper, in the usual course of trade, for a fair and valuable consideration, from an agent or factor, who has no authority or right to transfer them, but without any knowledge of that fact, or notice of the fraud, may hold them against the true owner.

But where *R.* having, as agent of *B.*, received negotiable notes, to be remitted to *R.*, delivered them to *C.*, as security against responsibilities as endorser of certain accommodation notes of *R.*, who had then stopped payment and become insolvent, but on which notes of *R.*, *C.* had not then become chargeable, it was *held*, that though *C.* had no knowledge that the notes so deposited with him belonged to *B.*, but believed *R.* to be the true owner of them, yet that he was not entitled to hold them, as against *B.*, the lawful owner, but was accountable to him for the amount, with interest.

November 17, 1820, and *January* 8, 1821.

THE plaintiff being owner of a vessel, employed *Randolph & Savage*, defendants, who were carpenters, to sell her on a credit, and take good notes in payment, and transmit the same to him, with an account of their charges, which he would pay. *R.* and *S.* sold the vessel for 3,875 dollars, and on the 3d of *June*, 1819, received the notes of the purchasers, payable in two, three, and four months; some of them being made payable to, and endorsed by *P. Aymar & Co.*, and the others by *J. R. Stewart*. On the 12th of *June*, 1819, *R.* and *S.* delivered the notes so endorsed to the defendants, *J. & C. Coddington*, who, were, at that time, as they stated in their answer, under heavy re-

sponsibilities for *R.* and *S.*, as endorsers of notes for their accommodation, payable at different times, but all subsequent to the 12th of *June*, 1819, and which they were afterwards obliged to take up, as they fell due, amounting to above 17,000 dollars. The answers admitted that *R.* and *S.* had stopped payment, when the notes so held by them were to be delivered to *J. & C. Coddington.*

The defendants, *J. & C. Coddington*, denied all knowledge of the manner in which the notes had come to the hands of *R.* and *S.*, and alleged that they believed that they were the *bona fide* and exclusive property of *R.* and *S.*; that they received these notes with others, as a guaranty and indemnity, as far as they would avail, for their responsibilities; and three days after, disposed of some of the notes for cash, and did not know, until several days afterwards, that the notes belonged to the plaintiffs, as stated in the bill. They admitted that when they so received the notes, *R.* and *S.* were not, in a strict, legal sense, indebted to them; but that they were under large gratuitous responsibilities for them.

November 17, 1820. No proofs were taken, and the cause came on to be heard on the pleadings only.

S. Jones, for the plaintiff, contended, 1. That the notes were not negotiated by *R.* and *S.* to *J. & C. Coddington*, in the usual course of trade, nor by the authority of the plaintiff, nor for any consideration given, nor for any responsibility incurred on the credit of the notes; and the defendants, *C.* and *C.*, could not, therefore, rightfully hold against the plaintiff, the true owner of them. (*Willes' Rep.* 400. 1 *Salk.* 160. 3 *Maule & Selw.* 562. *Cowper*, 165.)

2. That *R.* and *S.* having no property in the notes, nor any authority to use them, delivered them, after their insolvency was known, to *C.* and *C.* as security for responsibilities, for which they had not then become charged; and the notes could not, therefore, be held against the owner of them.

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3. That the notes were held by C. and C. merely as trustees for R. and S.

4. That as C. and C., under the circumstances of the case, could acquire no interest in the notes, as against the true owner, they ought to account for them to him, with interest.

Wells, contra, put the case not in the ground of a factor pledging the goods of his principal, but on the ground that the notes being *negotiable paper*, might be pledged by a *bona fide* holder, to secure an antecedent debt. The property and possession of *negotiable* bills or notes were inseparable. They might be transferred even by a person who had found or stolen them. Pledging the notes for an antecedent debt, or existing responsibility, was a valid consideration for the transfer, if a consideration was required. (3 *Burr.* 1516. 1 *Burr.* 452. 1 *Boss. & Pull.* 648. 5 *Boss. & Pull.* 170. 1 *Boss. & Pull.* 539. 13 *Mass. Rep.* 105. 15 *Mass. Rep.* 389.) If the defendants, C. and C., had not relied on these notes, taken without any knowledge or suspicion that R. and S. were not the true and *bona fide* owners of them, they might have had other security.

January 8, 1821. The cause stood over for consideration until this day.

THE CHANCELLOR. It is admitted that *Randolph and Savage* held the notes belonging to the plaintiff, and which they transferred to the defendants J. and C. *Coddington*, on the 12th of *June*, 1819, as agents or trustees for the plaintiff, and that they had no authority to pass them away. It was a gross and fraudulent abuse of trust, on the part of R. and S. The only question now is whether J. and C. C. are entitled, under the circumstances disclosed, to hold the notes, and retain the amount of them as against the plaintiff.

Negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as

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to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But the defendants *J.* and *C. C.*, have not entitled themselves to the protection of holders of that description. The notes were not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created or responsibility incurred, on the strength and credit of the notes. They were received from *R.* and *S.*, and after they had stopped payment and had become insolvent within the knowledge of *J.* and *C. C.*, and were seized upon by the *Coddingtons*, as *tabula in naufragio*, to secure themselves, against contingent engagements previously made for *R.* and *S.* and on which they had not then become chargeable. There is no case that entitles such a holder to the paper, in opposition to the title of the true owner. They were not holders for a valuable consideration within the meaning or within the policy of the law.

In *Miller* v. *Race*, (1 *Burr.* 452.) a bank note was stolen, and came to the hands of the plaintiff, and he was held entitled to it. But the Court of *K. B.* considered bank notes as cash, which passed as money in the way of business; and the holder, in that case, came by the note, for a full and valuable consideration, by giving money in exchange for it, in the usual course of his business, and without notice of the robbery, and on those considerations he was entitled to the amount of the note. So, in *Grant* v. *Vaughan*, (3 *Burr.* 1516. 1 *Black. Rep.* 785.) a bill of exchange payable to bearer, was lost, and the finder paid it to a grocer, for teas, and took the change. There the Court laid stress on the facts, that the holder came by the bill *bona fide*, and in the course of trade, and for a full and fair consideration, and that though he, and the real owner were equally innocent, yet he was to be preferred, for the sake of commerce and confidence in negotiable paper.

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Again, in *Peacock* v. *Rhodes*, (1 *Doug.* 633.) a bill of exchange, with a blank endorsement, was stolen and negotiated to a person who took it in the way of his trade, for cloth sold and cash for the balance, and he was held entitled to hold it. Lord *Mansfield* placed reliance on the circumstance that it was received in the course of trade. It was "by reason of the course of trade, which creates a property in the assignee or bearer," that *Holt*, Ch. J. (1 *Salk.* 126. *anon.*) held, that the owner of a bank bill which was lost and transferred by the finder to *C.*, for a valuable consideration, could not maintain an action against *C.* It will not be necessary to go further in support of the principle which uniformly pervades the cases upon this point, and I shall conclude with the case of *Collins* v. *Martin*, (1 *Bos.* and *Pull.* 648.) in which it was decided, that if bills of exchange, endorsed in blank, be deposited with a banker, to be received when due, and the banker raises money on them, by pledging them to *C.*, and then becomes bankrupt, *C.* could not be sued by the real owner, as he took them innocently, without knowledge of the previous circumstances. But it is to be observed that *C.* there advanced money to the banker, on the credit of the bills, and, as Ch. J. *Eyre*, observed in that case, "If it can be proved that the holder gave no value for the bill, then, indeed, he is in privity with the first holder, and affected by all that will affect him."

In short, I have not been able to discover a case in which the holder of negotiable paper, fraudulently transferred to him, was deemed to have as good a title, in law or equity, as the true owner, unless he received it not only without notice, but in the course of business, and for a fair and valuable consideration given or allowed on his part, on the strength of that identical paper. It is the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of

the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it.

I shall accordingly declare, that the defendants, *J.* and *C. Coddington*, are not entitled to the notes or the proceeds thereof, as against the plaintiff, who was the lawful owner of them when they were transferred to those defendants, inasmuch as they did not receive the notes in the course of business, nor in payment, in whole or in part, of any then existing debt, nor for cash or property advanced, or debt created, or responsibility incurred on the credit of the notes. And I shall direct that it be referred to a master to compute the amount of the said notes, with interest thereon from the times they were respectively payable, to the time of making the report; and that all the defendants in the amended bill, or some or one of them, pay to the plaintiff the sum that shall be reported as the amount of the said notes, with interest, as aforesaid, within thirty days after the master shall have made and filed his report, and notice thereof, and of this decree, or that the plaintiff may have execution therefor, against all or either of the said defendants, according to the course and practice of the Court.

And it is further ordered, that the defendants *R.* and *S.* pay to the plaintiff his entire costs of this suit, to be taxed, including the costs of the original bill, and that the plaintiff give credit upon the costs so to be taxed, the charges and commissions due from him to the said defendants *R.* and *S.* upon the sale of the vessel in the pleadings mentioned, and amounting to 96 dollars and 97 cents; and that he have execution for the balance of costs, after such deduction, against them, the said *R.* and *S.* according to the course and practice of the Court. And it is further ordered that no costs be taxed or allowed to the plaintiff, or to the defendants *J.* and *C. C.*, as against each other.

Decree accordingly.

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MURRAY v. MURRAY.

J. V. MURRAY *against* J. B. MURRAY, CLARK and others.

Where a commission of bankrupt was issued against one partner, and the assignees brought a suit to recover partnership property in the hands of trustees, to which the solvent partner, as well as the bankrupt and his assignees were made parties; and the *solvent* partner demurred to the bill, on the ground that the funds of the partnership ought not to be paid to the assignees, which was overruled, and after answer, a reference was made, and an account taken, and the trustees settled the amount with the assignees: *Held*, that the solvent partner was concluded by the decree and settlement in that suit, and could not reassert the same claim in a collateral action. A decree can never be impeached by an original bill, or in another suit.

The assignees of a bankrupt partner, under a separate commission, are tenants in common with the solvent partner: and where the assignees have got possession of the partnership funds, the solvent partner cannot call them out of their hands; or compel them, or partnership debtors who have settled with them, to account. The solvent partner is entitled only to his share of the *surplus*, after the partnership debts are paid. Besides, the assignees of the bankrupt have higher equities than ordinary tenants in common, for the purpose of an equal rateable distribution of the joint funds, &c.

Nov. 6, 1820, and *Jan.* 12, 1821.

THE plaintiff, on the 10th of *February*, 1808, filed his bill against *John B. Murray*, *John Innes Clark*, and others, which, in consequence of the death of *Clark*, was afterwards amended by making his executors parties. The plaintiff, *Robert Murray*, (since deceased) *George W. Murray*, and *John R. Wheaton*, in 1790, entered into partnership, and established their house of trade, under the firm of *Robert Murray & Co.* The house failed in 1796, at which time the plaintiff was in *England*, whither he had gone on the business of the firm: *G. W. M.* and *Wheaton* went to *Europe*, leaving *R. M.* the only partner in this country. *R. M.* for himself, and his copartners, by virtue of a power of attorney from them to him for that purpose, in 1798, and afterwards, made several assignments of the partnership property to *J. B. M.* and *Clark*, in trust, for the payment of

particular creditors. The bill charged that *J. B. M.* and *Clark*, in his lifetime, respectively received large sums of money under the assignments so made to them, far exceeding the amount of debts directed to be paid, and leaving a balance in their hands, to be accounted for to whoever was entitled to it. After the assignments were made, *R. M.*, *G. W. M.*, and *J. R. W.* respectively, became bankrupts, under the bankrupt law of the *U. S.* of *June*, 1800, and separate commissions were issued. The estate and effects of *R. M.* were assigned to *Caleb S. Riggs*, *Samuel Ward*, and *Charles M'Evers*; the estate and effects of *G. W. M.* were assigned to *Ward* and *V. Hayley*, and the estate and effects of *J. R. W.* to *Riggs*, *Ward*, and *M'Evers*, and these assignees, as well as the executor of *Robert Murray*, deceased, were made defendants. The several bankrupts obtained certificates of discharge, pursuant to the act. The plaintiff, *J. V. M.*, who returned to the *U. S.* after the failure of the house, was never declared a bankrupt under the law of the *United States*, nor has he ever obtained the benefit of any insolvent act of any state. The bill prayed, that the defendants, *J. B. M.* and *Clark* might account, &c. and be decreed to deliver up to the plaintiff, all the books, accounts, and vouchers, belonging to the firm; and pay the balance of moneys received, and deliver up all securities relative to the estate of the firm, &c. and for general relief. The defendants put in their several answers to the bill; and *J. B. M.* annexed to his answer an account of the moneys received and paid by him, under the assignments above mentioned, and submitted himself to the order of the Court, alleging that large sums of money were received separately by *Clark*, of which he could render no account.

O. Kane, the acting executor of *Clark*, in his answer, admitted the assignments, as stated in the bill, and that *C.* received large sums of money under them, in his lifetime; but he refused to render any account thereof to the plaintiff, insisting that he was not bound to render any account to him, and that the plaintiff was not entitled to any such account:

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and, among other reasons for such refusal, he alleged that the plaintiff was made a bankrupt in *England*, under the bankrupt laws of that country, and that a commission of bankruptcy had been issued against the plaintiff, and assignees appointed. The defendant, *K.*, moreover, insisted, that since the death of *C.*, and during the pendency of this suit, he, *K.*, as executor of *C.*, had made a settlement with the assignees of *Robert Murray*, under the bankrupt act, touching all the moneys received by *C.* in his lifetime, under the assignment, and had taken a discharge from the assignees. Replications were filed, and the cause was brought to a hearing on the 6th of *November* last, for the purpose of obtaining the opinion of the Court, whether the plaintiff was entitled to an account from *J. B. Murray*, and from *K.*, the acting executor of *Clark*, and to the payment of the balance in their hands, or to any, and what part of it, to the end, that if the plaintiff was so entitled, and the account refused by *K.*, he might be ordered to account before a master; and if the plaintiff was not entitled to such account, that the bill might be dismissed.

November 6, 1821. The cause was argued by *Wells* and *T. A. Emmet*, for the plaintiff, and by *S. Jones* and *D. B. Ogden*, for the defendants.

For the plaintiff, it was insisted, that the plaintiff, being the only partner of the house of *R. M. & Co.* who had not been discharged by the bankrupt law, or by any insolvent act, alone remained liable for the outstanding debts of the firm, and was, therefore, justly entitled to be put in possession of the funds of the partnership; and that the defendants, who were not so liable, ought not to have the distribution of those funds. The assignees of an individual partner are not competent, and have no right to the control and distribution of the partnership funds, so long as there is a solvent partner remaining. They are only entitled to a share of the surplus, after the partnership debts are paid, and the part-

nership accounts taken and settled. (*Taylor* v. *Fields*, 4 *Vesey*, 396. 12 *Mod.* 446. *Anon. per Holt*, C. J.) *Bankruptcy*, like the *death* of one partner, dissolves the copartnership, and the *solvent partner*, in the one case, like the *survivor* in the other, is entitled to the possession and distribution of the partnership property. The analogy exists, and must be supported throughout.

Again; bankruptcy is like a statute execution; but an execution against one partner can take only his separate share, or the surplus, after all the partnership debts and accounts are settled. (11 *Vesey*, 78. 2 *Johns. Ch. Rep.* 548. 16 *Johns. Rep.* 102. and *note*. 4 *Vesey*, 756.)

It is not, *of course*, that joint debts may be proved under a separate commission; and it is not, therefore, *of course*, that a separate commission sweeps away the whole joint property. The true rule is, that where there is a *solvent* partner and a joint estate, the solvent partner is to have the management of the joint property. If there is no joint estate, then the joint debts may be proved under a separate commission. There are only two cases in which the assignee under a separate commission is entitled to deal with the joint property; the one is where the solvent partner is abroad; (*Barker* v. *Goodwin*, 86. 1 *Montagu on Partnership*, 153.); the other is where the property is left in the possession of the bankrupt partner, at the time of his bankruptcy. (1 *Montagu on Partnership*, 151. 1 *East*, 369.) The assignees under a joint commission are tenants in common with the solvent partner; they are entitled only to the bankrupt's share of the partnership property, after the partnership accounts are taken; and the solvent partner is as much bound to settle the partnership concerns as the assignees. (1 *Montagu on Partnership*. 150, 151.) It would be extremely oppressive and unjust, as regards the *solvent* partner, if the assignees of the bankrupt should have a right to administer, and distribute the joint property. He is, in every respect, the best qualified; and sound policy, as well

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as justice, is in favour of vesting the distribution of the partnership fund in the hands of the solvent partner. (*Cook's B. L.* 123. 2 *Atk.* 528. 4 *Vesey*, 396.) In *England*, the assignees of joint creditors have no voice in the appointment of the assignees under a separate commission.

For the defendants, it was contended, that a reference and account having been taken, by consent, in the cause of *Riggs* and others, assignees of *R. M.*, against the *Murrays*, *W.* and *C.*, (2 *Johns. Ch. Rep.* 365.) and in which the validity of the assignments was established by the Court for the Correction of Errors, (15 *Johns. Rep.* 571.) the whole matter, as regarded the defendant *J. B. M.*, must be considered as settled. That as it respected *Clark*, or his representatives, it appeared that a bill was filed, in 1801, by the same assignees against the plaintiff and his partners, *J. B. M.* and *Clark*, for an account, and praying that the partnership funds, &c. might be paid to them, to enable the assignees to pay the partnership debts; that a reference was made by consent, and an account accordingly taken, and a balance of 78,328 dollars found against *Clark*; and his executors having proposed to pay the amount in lands, it was agreed to by the assignees, who executed a formal release, in *February*, 1810. The representatives of *C.* were not, after this discharge, accountable to the plaintiff. Most, if not all the joint debts have been proved under the separate commission against *R. M.*, who has been discharged, and these creditors are bound by the proof of their debts. The plaintiff has been insolvent for many years, and declared a bankrupt in *England*; and yet, in face of all these accounts and settlements, and of all these transactions, he now claims possession of the partnership funds!

Bankruptcy does not operate like death, in dissolving a copartnership, for it does not carry the joint property to the solvent partner; it transfers the interest of the bankrupt

to his assignees, and makes them and the solvent partner *tenants in common*, subject to his equitable rights. This is the sound and reasonable rule, and is to be found in all the books. (11 *Vesey*, 78. *Whitemarsh on Bankr.* 305. 5 *Vesey*, 295. *Cowper*, 448.) Now, each tenant in common has an equal right to the possession of the property. The plaintiff, as a tenant in common, has no right to call on the others to give up to him the common property. The analogy between bankruptcy and death, exists no farther than that they both dissolve the partnership. Bankruptcy creates a tenancy in common, and the joint tenancy ceases; but in case of the death of one partner, the right of *survivorship* takes place. (2 *Christian's Bank. Law*, 268.) The assignees of the bankrupt may seize on all the tangible partnership property, and collect all the partnership debts, for the purpose of distribution. The solvent partner can only claim the *surplus*: but the defendants, after payment of the debts, became trustees for *Robert M. & Co.*, not for the plaintiff. The settlement of the partnership concerns must be left entirely with the assignees of the bankrupt, and the plaintiff can come in only for his share. A plaintiff in execution may sell the interest of one partner, subject to the partnership claims and equities. The assignees of the bankrupt acquire peculiar equities.

A *joint* commission of bankruptcy has gone almost into disuse; for joint creditors may prove their debts under a separate commission. The joint creditors come in first on the joint estate, and if that is exhausted, they may go on the separate estate. And the assignees under a separate commission, keep distinct and separate accounts, as to the joint and separate estate. (*Christ. B. L.* 262. *Cook's B. L.* 258. 1 *Rose, B. L.* 21, note *a*. 1 *Rose*, 10. 17 *Vesey*, 193. 16 *Vesey*, 194. *Willes' Rep.* 467. 1 *Atk.* 133.) This rule, which is now adopted, has been found to be the most reasonable and practicable. A joint commission must

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be against all the partners, and if one of them resides abroad, there cannot be a joint commission. Hence has arisen the necessity and utility of a separate commission. If the doctrine contended for by the plaintiff's counsel was to prevail, the solvent partner abroad might come and take all the property from the assignees into his own hands, and entirely defeat their administration of the estate. If the other partner be solvent, then he ought to pay, and he will be entitled to his share of the property; but if he is insolvent, it would be extremely unjust to permit him to call the partnership property out of the hands of the assignees, and trade with it, or sell it. He might give preferences, and thereby defeat the whole equity of the bankrupt system, by which the funds are to be distributed *pari passu*. (1 *Johns. Rep.* 118. *Comb.* 217. 4 *Vesey*, 396.)

If the rule relied upon by the plaintiff's counsel is well founded, the separate commission could never reach joint property. But partnership debts, as well as private debts, pass by the plain language and meaning of the act. The solvent partner, and the assignees of the bankrupt partner, must all join in a suit at law to recover a partnership debt. The *solvent* partner cannot sue alone. This shows that he has not the exclusive control and distribution of the fund.

Again, the defendants are in the legal possession of the funds. The suit brought by the assignees, was four years before the plaintiff filed his bill. All the equity in this case might, and ought to have been brought forward in that suit. If the ground now taken by the plaintiff be tenable, that suit was improperly commenced, and there should have been a plea or demurrer interposed. But the parties went on, until a final report, and a compromise and settlement was made between them, which is now binding. Either the plaintiff must be deemed to have waived his right, or it has been adjudged against him. There cannot be several distributions of the same estate, and several suits. The first assignees of

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the bankrupt had a right to take and distribute the property. The partnership was dissolved. If there was joint property only, separate commissions would be idle. Where joint and separate commissions are both issued, the latter is superseded. (1 *Atk.* 252. 1 *Vesey & Beame's Rep.* 60. 15 *Vesey*, 115. 530. 16 *Vesey*, 237. 476.) It is admitted by the plaintiff, that the joint property is not sufficient to pay the partnership debts. What interest, then, can he have in the question? The joint creditors are alone interested, and they have given their assent, by coming in and proving their debts; and a majority of the joint creditors agreed to the compromise and settlement made between the assignees and the representatives of *Clark.*

THE CHANCELLOR. The question in this case, between the plaintiff and the assignees of his bankrupt partner, relates to the control and distribution of the partnership fund. The plaintiff, in a particular manner, claims the balance reported to be due from the estate of *John I. Clark*, deceased, to the house of *Robert Murray & Co.*, and insists that he is entitled, in preference to the assignees, to distribute that balance, and to disregard the settlement which was made by those assignees with the executor of *Clark.*

The defendant *John B. Murray*, and *John I. Clark*, were trustees to a large amount, under assignments from the house of *Robert Murray & Co.*, and though the bill seeks to call both those trustees to account, and to claim the balance due from each of them, yet the plaintiff's counsel, upon the argument, did not seem to press, very seriously, his claim against *John B. Murray*, who had already accounted and settled with the assignees. The account of *J. B. Murray*, was taken and stated *with the assent of the plaintiff;* and we will first examine whether the plaintiff be not now concluded in respect to his claim against *J. B. Murray.*

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1. The earliest commission of bankruptcy was taken out against *Robert Murray*, and his property was assigned under the bankrupt act, on the 2d of *July*, 1801; and on the 8th of *September*, 1801, the present defendants, *Riggs*, *Ward* and *M'Evers*, as his assigness, filed their bill to call *Clark* and *J. B. Murray* to account for the partnership property, and all the partners of the house of *Robert Murray & Co.*, including the present plaintiff, were made parties to the bill. The bill prayed that those two trustees might be decreed to pay over to them the partnership effects in their hands, in order that they might pay the parnership debts. The partnership debts were alleged to amount to upwards of 700,000 dollars, and the private property of *Robert Murray*, exclusive of his share in the partnership property, was stated to be very inconsiderable.

To this bill a demurrer was filed by the present plaintiff, on the ground that the funds of the house of *Robert Murray & Co.*, held by *J. B. Murray* and *Clark*, ought not to be paid to the assignees.

This demurrer was filed on the 5th of *March*, 1805, and it raised the very question now under discussion in this suit. It was overruled, on the 9th of *April*, 1807, and the present plaintiff ordered to answer. We find, that afterwards, on the 16th of *October*, 1812, when the cause came on to be heard, that a rule was entered by consent of the assignees, and of the defendant *John B. Murray*, and of the present plaintiff by his solicitor, directing a reference to a master, to take an account of the moneys received and paid by the defendant *John B. Murray*, under the said trust. An account was taken in pursuance of this reference, and finally settled with the assignees.

After the demurrrer was put in and overruled, and after the assent to a reference, in respect to *J. B. Murray*, in the suit brought by the assignees, and after a decision in that case in favour of the right of the assignees to the balance

finally liquidated against *J. B. Murray*, the present plaintiff is legally and justly concluded from questioning the validity of the accounting between *J. B. Murray*, and the assignees. He cannot, in this collateral suit, disturb that settlement, for he consented to the account being taken *in that suit*, and, of course, under the claim, and at the instance of the assignees of *Robert Murray*; and he made no further opposition to the proceedings in the cause, down to its final termination. And though in the decree in *September*, 1817, confirming the master's report, and awarding to the assignees the nett sum received by *John B. Murray*, as a trustee, the right of the present plaintiff to question the appropriation of that sum to the assignees was reserved, at the instance of his counsel; yet that reservation gave him no new right, and he had already parted with his right to question the claim of the assignees to that fund, by his unqualified assent to the account being taken. The decree was that the defendant, *John B. Murray*, account with the assignees for the sum adjudged to be due from him; and a settlement afterwards between him and the assignees was clearly binding upon the present plaintiff. There would be no certainty or safety to parties, and no end to litigation, if one of the defendants, after hearing his demurrer overruled, and after giving his assent to a reference to take the account in the cause, could withdraw himself from the further assertion of his claim, and suffer the suit to terminate, and then be permitted to reassert the same claim in a collateral action. A decree can never be impeached by an original bill, or in another suit.

2. The plaintiff's claim against the executors of *Clark* is not resisted upon the same ground; for here the plaintiff was no party to any of the rules or orders, under which the suit of the assignees against the executors, in respect to the partnership moneys, chargeable upon the estate of *Clark*, was finally and amicably settled. And here the general question occurs, whether the assignees of the bankrupt partners had

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not competent power to receive partnership funds, and discharge partnership debtors, even without the assent of the remaining solvent partner. If this point should be decided in the affirmative, it would equally protect the defendant, *J. B. Murray*, in his settlement with the assignees, without having recourse to the plaintiff's assent, or the decision in the other suit.

The assignees of a bankrupt partner, under a separate commission, are tenants in common with the solvent partner, and one cannot call the joint property out of the hands of the other.

The solvent partner, and the assignees of the bankrupt, must all join in a suit at law.

It is admitted, in all the cases, that the assignees of a bankrupt partner, and the remaining solvent partner, are tenants in common in respect to the partnership funds; and, like all tenants in common, one party cannot call the joint property out of the hands of the other. There is no such case. They are entitled equally to the possession in law. This was expressly held in *Smith* v. *Stokes*. (1 *East*, 363.) Trover will not lie for one against the other. It has, also, been held, that the solvent partner and the assignees of the bankrupt cannot sue alone, and that they must unite in actions at law. (*Ashhurst, J.* in *Graham* v. *Robertson*, 2 *Term*, 282. *Eckhardt* v. *Wilson*, 8 *Term*, 140.) What right, then, has the solvent partner to come into this Court, to call the entire joint funds out of the possession of the assignees, who are his co-tenants in common, and as such, have an equal control over the joint fund? There is no case giving to either party the absolute, exclusive possession and distribution of the entire effects. Neither party is strictly entitled, as against the other, to any thing more than his share of the surplus, after the partnership debts are paid. (*Field* v. *Taylor*, 4 *Vesey*, 396.)

The solvent partner is entitled, as against the other, to no more than his share of the *surplus*, after the partnership debts are paid.

In this case, there is no justice or equity in the pretension of the plaintiff. He admits that the partnership debts greatly exceed the partnership funds, and that there cannot be any surplus coming to either party. His sole object then is, to have the partnership funds, which have been or may be under the control of the assignees, pass into his hands, for distribution, instead of having them distributed by the assignees; and he denies all right in the assignees to touch or distribute

any of the partnership funds, and wishes to vacate all that they have done. But it appears that a great majority in interest of the joint creditors, and who have partnership debts due them to nearly 500,000 dollars, have come in and proved their debts under the separate commission in the case of *Robert Murray*. These include almost all the debts, except such as were provided for under the assignments to *J. B. Murray* and *Clark*. It also appears that the assignees, after having by suit obtained a liquidation of the balance due from the estate of *Clark*, and bestowed great care and efforts towards the recovery and security of that debt, settled it upon terms which they deemed prudent and just, under all the circumstances. This settlement and consequent discharge of the estate of *Clark* was in *February*, 1810; and in *October* following, due public notice having been given to the creditors, several of them appeared before the Commissioners of Bankrupts, and ratified that settlement. If there was any thing wrong in the settlement, it was for the creditors to disturb it, and it would be most unreasonable to permit the plaintiff to set aside all that had been done by the assignees under such a sanction from the creditors, merely for the purpose of making his own distribution. There is no charge of misconduct in the assignees. The whole bill is a denial of their competency to act, though every case on the subject admits that assignees of a bankrupt partner are tenants in common with the solvent partner. If the pretensions of either party to an exclusive distribution of the partnership funds, were to be examined upon principles of policy and equity, the assignees would have the better pretension, in the view of this Court, because the solvent partner has it in his power to give preferences, and defeat the equality and equity of the bankrupt system. Assignees, on the other hand, are bound to make a rateable distribution of the assets; and, being trustees under the control of this Court, there is no good reason why their equal rights at law, as

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tenants in common, should suffer diminution here. They are tenants in common, but with *particular equities in them*, as Lord *Eldon* observed, "vastly beyond what tenants in common have where no bankruptcy has occurred;" and their claim to the distribution of the partnership fund has been encouraged and strengthened by the decisions in Chancery. This will appear by a review of some of the leading Chancery cases.

It was well established in the time of Lord *Hardwicke*, that joint creditors could come in and prove their debts, under a separate commission of bankruptcy, against one partner, for the purpose of assenting to, or dissenting from, the certificate of discharge to the bankrupt. They were not allowed to come in and prove, for the purpose of receiving dividends with the separate creditors; and they were put to the necessity of filing a bill, and bringing before the Court the assignees of the bankrupt and the solvent partners, and having the account of the joint estate taken in their presence. The principle was, that the joint creditors had a preferable claim upon the joint effects, and the separate creditors upon the separate estate; and, therefore, the joint creditors could not come in upon the separate estate, until all the separate creditors were paid; and this was upon a plain rule of equity, that he who has two funds to resort to, shall not satisfy his debt out of that one of them to which another creditor can only resort, until he has exhausted the other fund.

This more ancient doctrine recognized, of course, the equal right of the assignees to the distribution of the joint fund, and the right of the joint creditors to come in under the cover of the separate commission. It only interfered with the application of the joint fund, by marshalling the joint and separate assets equitably between the joint and separate creditors. Indeed, the right of a joint creditor to come in and prove his debt and take his dividend, under a separate commission, is a clear legal right; for a joint creditor is still

a creditor of the bankrupt, and all the control that equity exercises over this right, is merely to marshal the funds upon equitable principles.

There is nothing, even upon the ancient doctrine in Chancery, that gives to the solvent partner any paramount rights over his co-tenants, the assignees, and, especially, a right to annul their acts, and call them to an account for all the joint funds in their possession.

It was determined, in the case *ex parte Crisp*, (1 *Atk.* 133. *Willes' Rep.* 67. *S. C.*) both by Lord *Hardwicke* and by the Court of *K. B.*, that a separate commission of bankruptcy might issue against one partner for a joint debt, upon the petition of a joint creditor. And the Ch. J. of the *Common Pleas*, in giving the opinion of the Court, said, that under a separate commission against one partner, the bankrupt's share of the partnership effects might be taken and sold, making satisfaction for the partnership debts, if joint creditors elected to come in under the separate commission, "as they generally have." The certificate, under the separate commission, was a discharge from the partnership, as well as the separate debts, because the partnership creditors might come in and prove their debts.

This decision considered a commission as an execution, and not as an action; but Lord *Eldon*, in *ex parte Brown* and *ex parte Munton*, (1 *Ves. & Bea.* 60.) admitted there was a difficulty in considering a commission of bankruptcy as an execution, in a strict sense; and that there was a difficulty also in respect to the other partners, in allowing a separate commission to issue upon a joint debt.

Lord *Thurlow*, after much consideration and consultation with the judges, adopted a different course on this subject, and allowed the joint creditors not only to come in under a separate commission and prove their debts, but, as a matter of right, to take dividends upon the separate estate; and

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he held a commission of bankruptcy to be an execution for all the creditors.

Lord *Loughborough* again departed from the rule adopted by Lord *Thurlow*, and restored the principle, though not the entire practice of Lord *Hardwicke*. He directed the assignees under a separate commission, to take an account of the joint estate, and applying that to the discharge of the joint creditors, to ascertain the shares of the residue belonging to the bankrupt and to the solvent partners. He adopted the reasonable practice of marshalling the dividends, and compelling the joint creditor to exhaust the joint fund, before he exercised his legal right of proving his debt, and taking his dividends out of the separate fund. The case *ex parte Elton*, (3 *Vesey*, 238.) contains, at large, the able discussion, and lucid principles of Lord *Loughborough*. He allowed the partnership creditor to prove his debt under the separate commission, and that his dividend should be set apart, and allotted to him out of the separate fund, but not paid until an account had been previously taken of the joint fund, and it had been ascertained how far his debt could be satisfied out of it. He said, that the joint creditor ought to be admitted to prove his debt under a separate commission, for the purpose of assenting to, or dissenting from, the certificate, and for receiving such surplus, beyond the amount of the separate debts, as joint creditors would be entitled to, if there were two commissions. The Court ought not to allow a joint creditor, who has two funds, to attach himself upon one fund, to the prejudice of those who have no other, and to neglect the other fund. A separate creditor cannot take a dividend upon the joint estate, rateable with the joint creditors, for at law he can only attach the interest of his debtor in that property. It is a settled rule in equity, that the joint estate was to be first applied to partnership debts, and the separate estate to the separate debts; and if the joint creditor was admitted, by an order in bankruptcy, to receive a

The rule in *England*, in cases of the bankruptcy of joint traders, seems to be, that joint creditors may prove their debts under a separate commission, and separate creditors under a joint commission; but distinct accounts are kept of the joint and separate estates, and the joint estate is first appli d to pay the partnership debts, and the separate estate to the separate creditors; and the surplus of each estate to the creditors remaining on the other.

dividend from the separate estate, the order, as he observed, would carry a chancery suit in the bosom of it. The assignees would be compelled to file a bill on behalf of the separate creditors, in order to restrain the dividend, and compel a contribution from the other parties, and to make them discover and apply the partnership fund, in order to throw the joint creditors upon it, and prevent the separate estate from being exhausted. The plain rule of distribution is, that each estate shall bear its own debts, and the usual directions in bankruptcy are to apply the funds distributively, the joint estate to the joint debts, the separate estate to the separate debts, and the surplus of each to come in reciprocally to the creditors remaining upon the other. The Lord Chancellor, accordingly, in that case, and in pursuance of this reasoning, admitted the joint creditor to prove, but not to receive, a dividend. He directed that to be reserved, until an account should be taken of what the joint creditors might receive from the partnership effects.

The same rule and practice were followed in *ex parte Abell.* (4 *Vesey*, 837.) The joint creditors were not allowed to take a dividend under the separate commission, until the separate creditors were paid.

Lord *Eldon* pursued the rule and practice of his immediate predecessor, Lord *Loughborough*, without presuming to say which was the best rule, that or the one of Lord *Thurlow*. In the case *ex parte Clay* (6 *Vesey*, 813.) and in two cases cited in a note to that case, Lord *Eldon* admitted the joint creditor to prove, for the purpose of keeping separate accounts, and assenting to, or dissenting from, the certificate, but not to receive dividends, in the first instance, with the separate creditors. In *ex parte Chandler*, (9 *Vesey*, 35.) a separate commission was sued out on the petition of a joint creditor, and the first creditors were permitted to prove, for the purpose of voting for assignees and *taking dividends*, provided they would pay the separate creditors.

The doctrine, afterwards, laid down in *Barker* v. *Goodair*, (11 *Vesey*, 78.) is quite decisive upon the question in this

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case, because it not only, like every case on the subject, admits the equal right of the assignees or tenants in common, to the joint fund, but it gives to the assignees higher equities than belong to ordinary tenants in common. Being exposed to the claims of the joint and separate creditors, they have an equity which the solvent partner has not; that is, to compel a contribution from the joint fund. Sir *S. Romilly*, in that case, observed, *arguendo*, that the assignees, as against the solvent partner, had a lien upon the whole property, until all the accounts were wound up, notwithstanding the tenancy in common. The Lord Chancellor said, that they had equities beyond what mere tenants in common had, and in the absence of the solvent partner, they could take the joint property, and pay all the joint creditors equally, and apply the surplus under all the equities subsisting between the partners. This, he said, was done every day. Lord *Kenyon*, in *Smith* v. *Stokes*, (1 *East*, 369.) had already stated another case, in which the assignees of a bankrupt partner were to take the whole property and sell it, and account to the solvent partner for his share. This was where the property was left in the possession of the bankrupt partner at the time of his bankruptcy.

The rule which Lord *Eldon* declared to be settled in *ex parte Martin*, (15 *Vesey*, 114.) and *ex parte Crew*, (16 *Vesey*, 236.; and see 475, 476.) goes strongly to show, that assignees under a separate commission can now distribute the whole partnership fund, for after a separate commission, a joint commission cannot issue; nor, on the other hand, can a separate commission issue after a joint commission. Joint and separate commissions cannot stand together, as they were permitted to do in the time of Lord *Hardwicke*. Now, by arrangement, one or the other is superseded, as may best answer the ends of justice. If the separate commission first issued, or by the arrangement, was permitted to stand, even if there was a joint commission, it would seem necessarily

In *England*, the assignees under a separate commission of bankrupt, can distribute the whole partnership fund; for after a separate commission a joint commission cannot issue, and *vice versa*. And where both are issued, one or the other is superseded, as may best answer the ends of justice.

to follow, that it must draw to it the distribution of the whole joint fund, after it had been marshalled upon the principles prevailing in equity.

It is said, again, in the case *ex parte Taitt*, (16 *Vesey*, 193.) that Lord *Loughborough* repeatedly made the order which Lord *Eldon* has followed, that the account of the joint estate should be taken under the separate commission, and that the assignees should keep distinct accounts, and distribute the joint estate among the joint creditors, and the separate estate among the separate creditors. But the difficulty was, that the account was taken in the absence of the other parties, and though Lord *Eldon* continued to follow the practice, established by Lord *Loughborough*, yet he was evidently not satisfied with it; and I should rather apprehend he preferred the rule of Lord *Thurlow*, allowing the joint creditors to come in fully and take their rateable dividends, and leave it to the assignees to bring the solvent partner into Chancery, and have the account of the joint estate taken in his presence, and contribution decreed. He observed, afterwards, in *Dutton* v. *Morrison*, (17 *Vesey* 191. and see also *ex parte Carlson*, 18 *Vesey* 439.) that he had continued to follow the practice of his predecessor, and under a separate commission, where the other partners were solvent, *he had directed an account of the joint estate to be taken*, in the absence even of the other partners; and upon the application of any one joint creditor, the order was, that the joint creditors were to be paid *pari passu*, out of the joint estate, and the residue to be distributed according to the respective interests of the partners. They were likewise entitled to their rateable proportions, (if requisite to satisfy their debts,) of the surplus of the separate estate.

Upon this review of the cases, I am not able to perceive any colourable reason for the pretension set up by the plaintiff, to the exclusive distribution of the partnership funds. There would be much more ground, upon the established doctrines of equity, for an exclusive right of distri-

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bution on the part of the assignees, since under their commission, the Court is in the practice of directing an account of the joint estate to be taken, and a distribution of that estate rateably among the joint creditors. The most that can be said is, that the solvent partner, upon the dissolution of the partnership by bankruptcy, being a tenant in common, may retain and distribute the funds in his possession, and may, as was held in *Fox* v. *Hanbury*, (*Cowp.* 445.) sell those partnership effects, for a valuable consideration and without fraud. They cannot be called out of his possession by his co-tenants, the assignees, unless under the direction of this Court, on a bill filed by them for contribution, or, perhaps, where an account of the joint fund is directed to be taken in bankruptcy. But on the other hand, there is no foundation in law or equity, for the solvent partner to call to account, either the partnership debtors who have *bona fide* settled with the assignees, or the assignees themselves, for the funds in their possession. They hold those funds by an equal title in law, with him, as tenants in common, and by a superior equitable title, as trustees, charged with the payment of both the joint and separate debts.

Decree.

I shall accordingly declare, that the plaintiff has no right or title in law or equity, to call the assignees to account for the partnership funds, which have been or are now in their possession as such assignees, in order to obtain, by decree, the possession of those funds for distribution among the creditors of *Robert Murray & Co.*, inasmuch, as those assignees have an equal right and title in law, as tenants in common with the plaintiff, and a better right in equity to the possession of those funds for the same purpose of distribution. And further, that the plaintiff has no right to annul or set aside the settlements made by the defendant *John B. Murray*, as one of the debtors to the house of *Robert Murray & Co.*, with the said assignees, and by the defendants *Oliver Kane* and *Ephraim Bowen*, jun., as ex-

ecutors of *John Innis Clark* deceased, also, one of the debtors to the house of *Robert Murray & Co.*, with the said assignees, in order to obtain possession of what was due from those debtors respectively, for the purpose of distribution, inasmuch as those assignees had competent power to make those settlements, and to obtain possession of what was due and coming upon those settlements, for the like purpose of distribution. And I shall direct the original bill, and bill of revivor and supplement, to be dismissed, but without costs, considering the special circumstances of the case, and the importance of the points investigated and discussed.

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Decree accordingly.

GOUVERNEUR and others, Executors of GOUVERNEUR,
against
ELMENDORF and others.

This Court will not afford relief against a contract, because of fraud, unless it be made a distinct ground of allegation, and be put at issue in the pleadings.

A vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of the covenants in his deed.

THE defendant, *Elmendorf*, gave a bond, on the 1st *October*, 1802, to the testator, *N. G.*, in his lifetime, for the payment of 5,000 dollars, the one half in two years, and the other half in three years; to secure the payment of which, *E.* executed a mortgage on certain lands in *Ulster* county. The bond remaining unpaid, the plaintiffs filed their bill in *August*, 1810, for a foreclosure of the equity of redemption, and a sale of the mortgaged premises, to satisfy the debt. The bill was taken *pro confesso* against *Ten Eyck* and *Doll*,

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the two other defendants, who had purchased parts of the mortgaged premises, with notice of the existence of the mortgage. *E.* appeared and answered; and in his answer admitted the bond and mortgage, as stated in the bill, and that no part of the principal or interest of the debt had been paid, except the sum of 300 dollars, in 1815. He stated, that the debt arose from a contract entered into between him and the testator, in *May*, 1802, shortly before his death; when the testator represented to him, that he was owner of about 20,000 acres of valuable land, in the State of *Kentucky*, which had been "located and secured to him, either by sure and perfect grants, or other assurances, from the said State, or by valid locations and surveys, which entitled him to patents from the State," which he was fully enabled to convey and warrant to the defendant *E.*, except a fourth part, which was to belong to one *Humphrey Marshall*, in that State, who had been appointed by the testator as his agent to secure and perfect the title, reduce the lands into possession under that title, and pay the taxes, for a certain period, in consideration thereof. That the testator proposed to sell these lands to the defendant for 8,000 dollars; observing, that he should only require the interest of that sum to be paid, and that the principal might remain, until the defendant could obtain the amount by a re-sale of the lands: that he was induced to make the sale on account of the ill state of his health, and the infancy of his children, who would be unable to manage such a concern; and that the defendant might calculate to make a fortune by the purchase. That the defendant agreed to purchase the lands on the terms proposed by the testator; but before the contract was executed, *N. G.* died, leaving the plaintiffs his executors, with full power to carry the agreement into effect. That the defendant, afterwards, applied to the plaintiffs to fulfil the contract; and they alleging that they had better offers, with apparent reluctance, consented to take 3,000 dol-

lars in cash, and a bond and mortgage for the residue; and the defendant accordingly paid to them the sum of 3,000 dollars, and executed the bond and mortgage for 5,000 dollars, as stated in the bill. That the plaintiffs, thereupon, executed a deed to the defendant, of "all those several Land-Office Treasury Warrants of *Virginia* therein aftermentioned," (describing them,) "and all the entries and locations made by virtue of the said warrants; and all the lands and tenements situated in the States of *Virginia* and *Kentucky*, either and each of them, which may have been, or may hereafter be located, granted, held, or obtained by virtue of the said warrants, or any or each of them," &c.; with covenants of warranty against the heirs and assigns of *Samuel Beall*, *John May*, *R. I. Brands*, and *I. & N. Gouverneur*; subject only to the claims of the said *John May* and *Humphrey Marshall*, for making the entries, locations, and surveys, &c., to the extent of one-fourth of the premises. That in 1803, the defendant went to *K.*, and found the titles to the lands so conveyed very complex and uncertain; that the legal estate to a part of them was vested in the heirs of *Samuel Beall*; the said *N. Gouverneur* having only an equitable title; that there were other patents and locations which interfered with those of the defendant, all, or the greater part of which, were in dispute with persons holding adversely to the claim under *Samuel Beall*, the particulars of which were stated in the answer. That on his return from *K.*, he offered to the plaintiffs to rescind the contract, which they declined doing. The defendant, under these circumstances, insisted that he ought not to be compelled to make any further payment on the said bond and mortgage; and hoped that the aid of the Court would not be afforded to the plaintiffs to enforce a foreclosure and sale, but that the plaintiffs might be ordered to accept a reconveyance of the property, and to repay, with interest, what the defendant had paid.

A replication having been filed, proofs were taken in the

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cause; and the material parts of the evidence are sufficiently stated in the opinion delivered by the Court.

October 31, 1820. The cause came on to be heard on the pleadings and proofs.

Harison and *B. Robinson*, for the plaintiffs.

T. A. Emmet, for the defendant.

THE CHANCELLOR. After a diligent consideration of the defence set up in this case, I am not able to perceive any sufficient ground for denying to the plaintiffs the ordinary remedy upon their mortgage.

The bond and mortgage charged in the bill, and admitted in the answer, were executed on the 1st of *October*, 1802. They were given to the plaintiffs, as executors of *Nicholas Gouverneur*, deceased, to secure part of the consideration upon the sale of "several land office treasury warrants of *Virginia*, and of the estate and interest of *N. G*, and of the executors, to all the lands which had, or might be located and obtained by virtue of those warrants." The answer states, that the proposal to purchase these warrants came from the testator, in *May*, 1802, and shortly before his death, and they were estimated to cover upwards of 19,000 acres of land in the state of *Kentucky*. The testator died before the contract could be consummated, and the negotiation was renewed with his executors, *upon the application of the defendant*, and it terminated in the execution of a deed by them, and in receiving 3,000 dollars in cash, and the bond and mortgage mentioned in the bill.

There is no colour for a charge of misrepresentation or fraud, on the part of the grantors. I do not understand that any such charge exists in the answer, or was intended by it, as a substantial ground of defence, though such a charge is now put forward by the defendant's counsel, as one of their points. But it is requisite that the charge of fraud should

be made a distinct ground of allegation by the party in *pleading*, otherwise, it is not to be deemed in issue, and cannot affect the contract in question. This was the clear and decided doctrine of the Court of Errors, in *James* v. *M'Kernon*, (6 *Johns. Rep.* 543.) and that case may be considered as perfectly in point, as to this part of the defence. If this were not so, yet there is nothing in the proofs to support an allegation of fraud in the testator, when he made the proposal to sell, or in the executors when they executed the deed.

The testator dealt in good faith. The interest in the land warrants and in the locations under them, came to him from *Robertus S. Brands*, who was naturalized in *Maryland*, as early as 1784; and in 1799, an act of the legislature of *Kentucky* was passed, to legalize the transmission of the title of *Brands* to *J.* and *N. Gouverneur*. And when the testator wrote to *H. Marshall*, his agent, on the 10th of *January*, 1796, that he was satisfied that *Brands* had a clear title, there can be no doubt that it was a declaration made in perfect sincerity. Mr. *Marshall* says, he had once offered the testator 4,000 dollars for his claims, and to run all risk as to title; but that he afterwards declined it, on the ground of the alienage of *Brands*, which objection, as it has since appeared, was without foundation. The testator, no doubt, knew that there were embarrassments as to some of the locations, and difficulties and obscurity as to parts of the lands claimed; and he had employed Mr. *Marshall* to investigate the titles. We may be satisfied, that if the titles to the whole 19,000 acres, had been ascertained and clearly established, those lands never would have been offered for sale to the defendants for 8,000 dollars. They were worth, at least, from 3 to 4 dollars an acre, in their natural state. It was, therefore, a purchase by the defendant upon speculation, and he took upon himself, at his own peril, the chance of great gain, and the hazard of some loss.

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Nor is there any colour for the imputation of fraud to the executors. They knew no more of the subject, or of the goodness of the titles than the defendant, and the answer admits, that the sale was *reluctantly* made by them, at his solicitation. The vendor selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants. The case of *Bree* v. *Holbeck*, (*Doug.* 654.) is a strong and pointed case of this kind, and quite applicable to the attempt in this case, to get rid of the payment of the consideration. The administrator, with the will annexed, in that case, found a mortgage deed among the papers of the testator, and assigned it, and it turned out to be a forgery. It was held by the K. B., that the purchaser of the mortgage could not recover back the consideration he had paid, for there was no other covenant than that the testator or the administrator had not incumbered the estate, and it was incumbent on the purchaser to have looked to the title. This decision was, afterwards, sanctioned by Lord *Kenyon*, in *Cripps* v. *Reade*, (6 *Term*, 606.) and the doctrine contained in it, by the Court of C. B. in *Johnson* v. *Johnson*, (3 *B. & Pull.* 162.) by the Supreme Court of this State in *Frost* v. *Raymond*, (2 *Caines*, 188.) and by the Courts of Equity, in the cases referred to in *Abbott* v. *Allen*, (2 *Johns. Ch. Rep.* 523.) There can be no doubt that the executors dealt with perfect candour, and made all the disclosures within their knowledge; and it was pertinently asked by one of the counsel for the plaintiffs, how came the defendant in possession of the correspondence between *Marshall* and the testator, and the original letters from the former to the latter, if they were not delivered over to him by the executors?

But the subsequent acts and confirmations of the defendant do, of themselves, put an end to all objections on the ground of fraud, or misrepresentation, or a want of consideration and value, imputed by him to the purchase. Let us attend, for one moment, to a connected history of those acts.

The negotiation for the purchase was entered into between the defendant and the testator, in *May*, 1802; and we are bound to presume, that all due inquiries were made, and all due disclosures exhibited. The death of the testator put an end to the negotiation. It was renewed with his representatives, who were under ignorance equal to that of the defendant, as to the title and value of the subject; and in *October*, 1812, the deeds were exchanged. Here the defendant had an interval of four or five months to reflect and examine, and to make inquiries, and to investigate the state and condition of the title, and the possession, condition, and value of the lands. After receiving a deed, he went to *Kentucky*, in the spring of 1803, and had conversations with Mr. *Marshall*, the former agent of the testator, and satisfactorily discovered the state and situation and amount of the locations under the warrants, and the incumbrances upon those locations by the claims of *John May* and *Humphrey Marshall*, and the fact of interfering claims and locations, and of adverse possessions. All this appears from the answer; and Mr. *Marshall* says, that the defendant, upon that visit, entered into "a more particular agreement" with him to carry on the investigation in respect to the titles; and, by that agreement, the defendant was to do what was necessary to establish his own title to the land, and the witness was to prosecute and defend all suits, as to adverse claimants, at his own expense, and to pay the taxes. All this was part of the new agreement between the defendant and his agent. On the defendant's return to this State, laden with all this knowledge, he takes a new deed from the plaintiffs, and cancels the former one. The new deed is of the date of the 14th of *May*, 1804; and he, at the same time, executes to the plaintiffs a bond of indemnity of the same date against the claims of *John May* and *Humphrey Marshall*, in regard to their agency in the premises. This was one of the most solemn recognitions that could have been made of the original contract, with full knowledge, derived from the most

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authentic sources, of all the circumstances belonging to the case. It would seem to be impossible, after this, for the defendant to allege, with any plausibility, fraud, or misrepresentation on the part of the plaintiffs. He ratified the bargain, after due notice and inquiry; and afterwards, in the spring of 1805, he paid 300 dollars towards interest. And nearly three years after the ratification, he writes a letter to one of the plaintiffs, on the 3d *January*, 1807; and though, in that letter, he says he was "as uncertain in regard to the *Kentucky* property as at first," and that his agent had done nothing "to progress the claims which he had been so unfortunate as to take from off his shoulders" (meaning the executor); yet, that he "meant to have paid before this, and had done his utmost, but had not been able to raise the money; that he expected reimbursements that winter, out of which he should pay him (the executor) as much as possible. He hopes he (the executor) will be content with receiving interest, till he can effect a sale of some property; and thinks it will not be much of a favour for the executors to wait for the principal, till he was able to dispose of property to discharge it."

Nor is there any breach of the covenants contained in the deed to the defendant. There were no covenants, except against *R. S. Brands* and his representatives, and the representatives of *S. Beall* and of *Isaac* and *Nicholas Gouverneur*, and the persons claiming under them; and there is no proof of eviction or disturbance under any claim derived from either of those sources. Even, if the mere failure of title was made out, it would not alter the case, or help the defendant, for he took the risk of the goodness of title upon himself. He knew with whom he dealt, and the nature of the hazardous, but flattering, speculation in which he engaged. He has no remedy, but under the express covenants in his deed; and these covenants have not been broken. If it was in the power of the defendant, yet it would seem to be very unreasonable and inequitable for him, at this late day, and after a

lapse of 18 years, to rescind the contract, and cast back upon the plaintiffs the burthen of rescuing a title now impaired and oppressed by the great lapse of time, and the want of due diligence or skill on the part of the defendant. There is no good reason to suppose, but that vigilant and well directed efforts in the prosecution of the title of the testator, under *R. S. Brands*, if they had been commenced in 1802, and steadily and unremittingly pursued, would have saved the defendant from loss, if they did not yield him a considerable gain. The adverse possessions should not have been suffered to spread and take root, and ripen into right; and if the defendant had not voluntarily "taken the burden from off the shoulders of the plaintiffs," how can we now safely say, that *they* might not have realized a more valuable consideration? There is no case in which a party, with knowledge of all the circumstances, has been permitted to hold to a bargain for years, and then, at last, to throw it up as unprofitable.

There has been no decision to this day, in the *Kentucky* Courts, upon the merits of the *Brands* title; and Mr. *Marshall* says, he does not know that any of the suits brought by him, on behalf of the defendant, are affected by any of the statutes of limitation. The decision of the Court of Appeals in *Kentucky*, of the 10th *April*, 1817, turned upon a matter of evidence as to the requisite proof of the will of the testator. This was an objection rather of form than of substance, and was capable of being cured; and the defect of proof in that case was imputable to the want of due diligence and inquiry in the defendant. And how the Court of Appeals in *K.* could say, that the deed from the plaintiffs was not executed by a majority of the executors of *N. Gouverneur*, when the deed was executed by three out of five of the executors named in the will, I am at a loss to understand. There must have been some mistake, either in the documents before them, or in the documents before me, as to that matter of fact.

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The defendant has no right to charge the plaintiffs with the loss, if any, resulting from the sales made by the Marshal of the district of *Kentucky*, for *U. States* taxes. The lands were sold in 1805, and the deeds executed to the purchaser (who bought in large tracts, for a nominal consideration) in 1807. By the new agreement made between the defendant and *H. Marshall*, in 1803, when the defendant appeared and assumed the control of the lands, and of the interest therein, as owner, *Marshall* was to pay all taxes. It was incumbent, then, upon the defendant, or his agent, to discharge those *U. S.* taxes, or to redeem the lands. The plaintiffs were not chargeable with any duty, or with any negligence, upon that point. That task was assumed by the defendant, and conferred upon his agent; and the petty incumbrance of *U. S.* taxes was not within any of the covenants in the deed to the defendant.

Upon the whole, whatever sympathy may be felt towards the defendant, for his losing bargain, there is no principle in law or equity to be deduced from the case, that will justify this Court in rescinding the contract of purchase, or in denying to the plaintiffs their ordinary remedy upon their mortgage.

I shall, accordingly, direct, that the usual decree for a foreclosure and sale be entered.

Decree accordingly.

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Cook and Kane *against* Mancius and Visscher.

An incumbrancer, *pendente lite*, need not be made a party to a suit for the foreclosure of a mortgage; and he is not entitled to redeem, unless under special circumstances: as where he became a judgment creditor after the commencement of the suit, but before the decree, and the purchaser at the master's sale had previous notice of the judgment, and by a previous engagement with the mortgagor, obtained from him an order for the surplus moneys, which was accepted by the master.

The Court does not take notice of a purchaser of the subject matter, pending the suit.

Where a trustee, and his *cestui que trust*, as plaintiffs, file their bill, and pending the suit, the *cestui que trust* assigns his interest to another, it is no objection at the hearing, that the latter was not made a party.

THE bill, filed *August* 6, 1818, stated, that the plaintiff, *Cook*, on the 9th of *July*, 1817, obtained a judgment in the Supreme Court, against the defendant, *Visscher*, for 1,725 dollars and 92 cents, which was in trust for the plaintiff, *Kane*. That a *fi. fa.* was issued on the judgment, under which, and other executions, the sheriff sold the personal property of *V.* for 357 dollars: and on the 24th of *July*, 1818, he sold at public auction, to the plaintiff *C.*, as the highest bidder, for ten dollars, all the interest of *V.* in a certain piece of land in *Water Vliet*, of which *V.* was seized, subject to a certain mortgage, which *Gerrit G. Van Zandt*, who was seized of the land before the purchase thereof by *V.*, gave to *Henry Ostrom*, on the 22d of *May*, 1810, to secure the payment of 2,785 dollars. That proceedings having been had in this Court for a foreclosure of the mortgage, a decree for the sale of the premises was entered on the 25th of *May*, 1818. That the defendant *V.*, after the judgment, and before the sale of the premises, in order to defraud the plaintiff *K.* of the benefit of the judgment, sold the premises, without consideration, to the defendant *Mancius*,

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and by deceitful representations to the solicitor and counsel of the mortgagee, procured the decree for sale to be entered with directions that on the sale the surplus moneys, if any should remain, after satisfying the mortgage debt and costs, should be paid over to the defendant, *V*. That on the 21st of *July*, 1818, the master sold the mortgaged premises at auction, under the decree, to the defendant *M*., for 2,000 dollars. That the balance of the mortgage debt, with the costs, amounted to 1,080 dollars. That *M*. had notice of the judgment, and that it was unsatisfied. That *M*. endeavoured to conceal from the plaintiffs that the premises were to be sold under the decree, at the time mentioned. That on the day of sale, *C*. offered to pay the master the amount due on the mortgage, with the costs, which he refused to take; and immediately after the sale, *C*. gave a written notice to the master, that he was the holder of an unsatisfied judgment, in trust for *K*. and as such, was entitled to the surplus of the purchase money remaining, after payment of the mortgage debt and costs. That the plaintiffs, as soon as it was in their power, after the sale, obtained an order of this Court, requiring the master to pay the surplus into Court; but the master reported that he had paid the money over to *V*. That *M*. did not pay the 2,000 dollars bid by him at the sale, but only the amount due on the mortgage and the costs, being 1,080 dollars. That *M*. acted as the agent of *V*., and for the purpose of defeating the claim of plaintiffs, purchased the land, under an agreement with *V*., that the residue of the 2,000 dollars, after deducting the mortgage debt and costs, should be deducted from the consideration agreed to be paid for the land, in case he should be obliged to pay the residue to the plaintiffs. That *V*. has never received from *M*., the residue of the purchase money. That the plaintiffs have applied to the defendants for the residue of the purchase money, or a transfer of the premises, on receiving the amount of the mortgage debt and costs,

which the defendants have refused. That *M.*, before the sale, knew that *V.*, by fraudulent artifices, had procured the order of sale to be so drawn, as to the payment of the surplus moneys. *Prayer*, that the defendants may be decreed to pay into Court, or to the plaintiffs, the surplus of the purchase money, being 920 dollars; or that they execute a deed to the plaintiff *K.*, for the land; and pay the costs and charges, &c. and for general relief.

The *answer* of the defendants admitted the judgment, &c. but denied that it was in trust for *K* It stated, that the suit in which the decree of sale was made, was brought by *Ostrom*, as plaintiff, against *Van Zandt* and his wife, *L. Standford*, and *Visscher*, defendants, and that the decree directed that after paying the mortgage debt and costs, "the residue of the money, if any, should be paid to the defendant *V.*" That *C.* attended the sale, and was a bidder. That the plaintiffs, before the sale, were duly apprised of it, and knew that they were not parties to the decree, and that the surplus moneys were to be paid to *V.* under it. The defendant *M.* stated, that on the 21st of *July*, 1818, *V.* was justly indebted to him in the sum of 212 dollars and 15 cents, and that the principal inducement of *M.*, in attending the sale, was to secure that debt, *V.* having since become wholly insolvent. That in *June*, 1818, *M.* applied to *V.* for information respecting the premises so to be sold under the mortgage, and it was agreed between *M.* and *V.*, that *M.* should take an order from *V.* on the master who should sell, for the surplus moneys, if any, arising from the sale, in full of his demand against *V.* That the order was accordingly drawn on the day of sale, but before it was made, and *M.*, in consideration of that order, discharged *V.* from the demand he had against him; and after the sale, the master, on the same day, accepted the order. That the whole transaction was in good faith, and without any intent to defraud the plaintiffs. That *M.* confided in the decree, and in the validity of any acts done, *bona fide*, under it. *M.* admitted that he

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knew of the judgment in favour of *C.*, but alleged that he supposed the acts above stated were fully protected by the decree. That the plaintiffs had notice of the proceedings in Chancery to foreclose, in time to have applied to the Court. The defendants did not use any contrivance to conceal from the plaintiffs, that the premises were to be sold on the 21st of *July*, 1818, or at any other time. And they alleged, that the bill of foreclosure was filed *January* 25, 1813, and the plaintiffs had legal notice of it. They denied that *C.*, at the time of the sale, or at any other time, offered to pay the master the amount of the mortgage debts and costs, or that he refused it; but they alleged, that the surplus moneys had been legally and fairly disposed of, by the master's acceptance of the order of *V.*, prior to any written notice to him from *C.* They denied that *M.* acted as the agent of *V.*, in the purchase of the premises, or with a view to defeat the collection of the judgment, or with any fraudulent purpose, or upon any agreement, that the surplus moneys were to be deducted from the consideration, if *M.* should be compelled to pay it to the plaintiffs, or upon any trust whatever; but that the purchase was made exclusively for the benefit of *M.* They denied, that they, or either of them, procured the decree to be drawn in the manner above stated. *M.* admitted, that a few days before the sale, he understood from *V.*, that by the decree, *V.* was entitled to the surplus moneys, if any, arising from the sale, and *M.* called at the office of the solicitor of *Ostrom*, and saw the decree.

Witnesses were examined on both sides, and exhibits made in the cause. The material facts not admitted in the pleadings, are stated in the opinion of the Court.

W. A. Duer, for the plaintiffs.

J. V. N. Yates, for the defendants.

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THE CHANCELLOR. The plaintiff *Cook* obtained a judgment at law against the defendant *Visscher*, on the 9th of *July*, 1817. There was, at that time, and had been for some time previously, a suit pending in this Court, by *Henry Ostrom*, to foreclose a mortgage given by *Gerrit G. Van Zandt*. The defendant *Vesscher*, who was a purchaser under *Van Zandt*, and owned the equity of redemption, was a party to the bill of foreclosure. A decree for the sale of the mortgaged premises was obtained on the 25th of *May*, 1818, and a sale made by the master on the 21st of *July*, 1818, and the defendant *Mancius* became the purchaser for 2,000 dollars, which was 920 dollars beyond the balance of debt, interest and costs due, at that time, to *Ostrom*. The plaintiffs now seek to recover that surplus from *Mancius* the purchaser, or else to redeem the mortgaged premises, or for some other general relief, under the special circumstances disclosed in the case.

The plaintiff was a junior incumbrancer, and became such pending the mortgage suit, but it was long prior to the decree, and it would seem upon principles of equity, that he was entitled to have his judgment satisfied out of the residuary interest of the defendant *V.*, in the land, after the mortgage debt and costs were paid. He had an equitable lien upon that equity of redemption, or upon the surplus moneys arising upon the sale. By the terms of the decree in *Ostrom's* suit, (and which terms were procured as will be hereafter explained,) the residue of the moneys, if any, were directed to be paid over to the defendant *V.*, in whom the equity of redemption resided; and they were paid over, by his order, to the defendant *M.*, so as entirely to exclude the claim of the present plaintiff. If the plaintiff had been a judgment creditor *at the commencement of the suit* to foreclose the mortgage, the mortgagee would have been bound to have made him a party, or else the decree and sale would not have taken away his right to redeem, even as against *Mancius* the purchaser. This prin-

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An incumbrancer *pendente lite*, need not be made a party; and he is not entitled to redeem, unless under special circumstances; as where the plaintiff became a judgment creditor after the commencement of the suit to foreclose the mortgage, and prior to the decree of foreclosure and sale, and the purchaser had notice of the judgment, and of the *lien* of the plaintiff on the surplus moneys.

ciple was discussed and sufficiently explained in the case of *Haines* v. *Beach*, (3 *Johns. Ch. Rep.* 459.) and in the authorities there referred to. But the present plaintiff became an incumbrancer *pendente lite*, and therefore, according to the doctrine, in the case of *The Bishop of Winchester* v. *Paine*, (11 *Vesey*. 194.) it was not necessary that he should have been made a party, and he has no right to redeem. This may, perhaps, be true as a general proposition, but the special circumstances of this case ought to take it out of the general rule. Here the plaintiff became a judgment creditor prior to the decree, and the purchaser had notice of his judgment and of his claim upon the surplus moneys prior to the sale, and there is reason to infer some understanding and arrangement, between the two defendants, intentionally and studiously to divert the surplus moneys from the plaintiff to themselves. If the facts will warrant this conclusion, the prior notice of the plaintiff's claim upon the surplus moneys may operate upon the purchaser equally as if the plaintiff's incumbrance existed prior to the commencement of the suit upon the mortgage. Equity attaches great importance to *notice* of another's claims or pretensions, and generally charges a party, whether he be a purchaser or otherwise, who acts regardless of such notice, with all the duties that such claims impose. Though the mortgagee is not bound to take notice of incumbrancers who became such, *pendente lite*, yet such an incumbrancer acquires a lien upon the residuary interest of the debtor, which this Court does regard, in a variety of cases; and I presume that upon due application by such a creditor, the Court would not suffer the surplus moneys, after the prior incumbrance was satisfied, to pass into the hands of the debtor. Here the mortgage suit had been pending since *January*, 1813, and can it be possible that all subsequent incumbrancers, however slow may be the progress of the mortgage suit, are to be utterly disregarded? If the mort-

gagor can take or appropriate to himself the surplus money, or the cash value of the equity of redemption, and the purchaser can also buy with notice of the subsequent incumbrance and of the claim of the creditor to the surplus, and yet hold the land discharged of any right of redemption, the lien of the subsequent creditor is utterly defeated, and becomes of no value. That right is entitled to some efficient protection, and the subsequent judgment or mortgage creditor must have a right, either to come in and be made a party, so as to secure his claim upon the surplus, or if he can charge the purchaser with previous notice of his judgment, and of his claim under it upon the equity of redemption, he must be entitled to redeem equally as if he had been an incumbrancer at the commencement of the suit.

Before we look more particularly into the facts in this case, there are one or two preliminary points to be disposed of.

Whether a naked trustee, who is plaintiff, can be made a witness, though liable for costs?

It has been made a question, whether the plaintiff *Cook*, was a competent witness in the cause, inasmuch as he may be responsible for costs, though a naked trustee. But as his testimony does not appear to be essential to the determination of the case, I have assumed, for the purpose of this discussion, that the objection to the competency of his testimony was well founded, and have not regarded it.

Another objection is made to the want of parties. The plaintiff *C.*, the legal owner of the judgment avers, that he holds it only as trustee for *James Kane*, who is a party to the bill. We have, then, the trustee and *cestuy que trus* parties to the bill. But it was vaguely intimated in the answer, put in upwards of a year after the bill was filed, that *Oliver Kane* had some interest in the judgment, and it was proved by one of the witnesses, *Thomas Bridgen*, that the plaintiff *K.* informed him that his interest in the judgment had been assigned to *O. K.* When this information was given, or the assignment made, does not appear. He

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was examined as a witness, in *June*, 1820, and he says, that *O. K.* informed him of the same fact, "some time ago." The bill was filed in 1818, and we may as well intend that this assignment was made after, as before the filing of the bill; and if the defendants meant to rely upon so formal and technical an objection, it was incumbent upon them to have shown clearly the existence of the fact at the commencement of the suit. A change of interest from the *cestuy que trust* to another, *pendente lite*, can hardly be admitted as sufficient to support the objection, at the hearing, of a want of parties, when we have before us the party in whom the legal title resides, and the *cestuy que trust* existing at the filing of the bill. The Court is not bound to take notice of any interest acquired by purchase in the subject matter of a suit pending the suit.

Where a trustee and his *cestuy que trust* are plaintiffs, and pending the suit the *cestuy que trust* assigns his interest to another, it is no objection at the hearing, that such assignee is not a party.

The Court does not take notice of the purchase of the subject matter, *pendente lite*.

The facts connected with the sale, form the equity of this case. *Mr. Henry*, the Solicitor for *Ostrom*, the plaintiff in the mortgage suit, says that he drew the decree of sale, and inserted therein the usual clause, "that the residue (if any) of the moneys be brought into Court, to abide the order of the Court," and that those words were, afterwards, obliterated from the draft, and the words "paid to the defendant *Visscher*" substituted, *at the instance and upon the application of the defendant V.* That alteration has probably produced the present suit. The solicitor acted without the knowledge of any judgment creditor existing entitled to the surplus, and without any suspicion of the design of the defendant *V.*, who knew of the judgment, and who concealed that knowledge from the solicitor. Mr. *Henry* says he believed that *V.* would be entitled to the surplus moneys. The concealment from the solicitor, when he was requested to alter the decree, of the fact of there being an unsatisfied judgment creditor, whose lien attached upon the equity of redemption, is the circumstance of which I complain. It may be laid down as a clear rule of ethics, that it is wrong to procure an act to be done, which would

not have been done, if a material and pertinent fact known to one party and not to the other, had been disclosed.

The decree was entered in *May*, 1818, as of course, and there is no evidence that the judgment creditor had any knowledge of the pendency of the suit upon the mortgage, until within a few days of the sale. In *June*, 1818, an arrangement was made between the defendant *V.* the owner of the equity of redemption, and the defendant *M.*, the subsequent purchaser at the master's sale, to secure those surplus moneys for their joint benefit. It would appear from the answer, that the defendant *V.* was indebted to the defendant *M.* on simple contract to the amount of 212 dollars and 15 cents; and the latter applied to the former for information respecting the mortgage suit, and the land to be sold under the mortgage, and understood from him that by the decree, the defendant *V.* would be entitled to the surplus moneys; and for his greater satisfaction, the defendant *M.* called at the solicitor's office to look at the decree. The subsequent agreement between the two defendants, made on the 20th of *June*, 1818, was, that the defendant *M.* should accept of an order from the defendant *V.* upon the master, for the surplus moneys, whatever they might be, in full of the above simple contract demand. On the day of sale, the defendant *M.* attended as a bidder, and on that day, but previous to the sale, the order was drawn. He says, that his motive in attending the sale, was to purchase, in order to secure his demand, according to the above arrangement. The defendant *M.*, accordingly discovered an anxiety to have the sale go on, and urged it on, though the plaintiff's counsel was present and pressing a postponement. The latter offered his check, or that of another person, for the mortgage debt and costs, to the agent who attended on behalf of the solicitor for *Ostrom*, the mortgagee. The plaintiff *C.* offered, moreover, to procure the money, if the check was objectionable, but he was referred to another immediate agent of *Ostrom*, who was present, and does not recollect

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that any such offer was made to him. The sale was made, and the conveyance to *M*, the purchaser, executed, and the whole transaction consummated with a rapidity that is rather alarming. Immediately upon the sale, the order of the defendant *V.*, in favour of the defendant *M.*, was accepted by the master as equivalent to a payment of the surplus moneys, and the defendant *M.*, on the same day discharged the defendant *V.* from his demand, and retained to himself the surplus value of the bid, after satisfying his simple contract debt; the residue of that surplus so retained, as a gratuity from the defendant *V.*, amounted to 704 dollars and 85 cents. The answer says, that the surplus moneys were legally and fairly disposed of by the acceptance of the order.

The plaintiff *C.*, who had made unavailing efforts to stay the sale, or to discharge the mortgage debt, and preserve the lien of his judgment, took other steps to prevent the surplus moneys from passing under the control of the defendant *V.* Here, also, his vigilance failed him. The attorney for the plaintiff *C.*, and in his name, gave written notice to the master *immediately upon the sale*, that he was the holder of an unsatisfied judgment as trustee of the plaintiff *K.*, and that he was entitled to the surplus moneys on the sale of that day. It seems extremely probable from circumstances, that this notice came immediately to the knowlege of *M.*, the purchaser. He had a conversation with the attorney of the plaintiff *C.* prior to the sale, relative to the plaintiff's judgment; and just before the sale the defendant *M.* had a conversation with the plaintiff *C.*, relative to the amount necessary to be bid, in order to make the requisite surplus to satisfy the judgment. The purchaser *M.* was thus duly apprized, when he purchased, not only of the existence of the judgment, but of the actual and avowed claim of the plaintiff *C.* to the surplus. The master as well as the purchaser

disregarded this notice; but I do not mean to implicate him in any censure, for he followed the words of the decree, as they had been inserted, at the instance of the defendant *V.*, directing the surplus to be paid to the defendant *V.* He accepted the order of that defendant, as a payment to him of the surplus moneys, amounting to 920 dollars, and on the succeeding day he made his report of the sale, and of the disposition of the purchase money. It was not until the third day that the plantiff *C.* was able to apply to this Court, and obtain an order upon the master, to bring the surplus moneys into Court. That order, unfortunately for the plaintiff, was obtained a day too late.

The defendant *M.*, by this arrangement with the defendant *V.*, and by his purchase, with knowledge of all the equity of the plaintiffs' case, and with explicit and monitory notice, not only obtains payment of his simple contract debt, out of land bound by a judgment, and in preference to that judgment, but he makes an absolute profit of 704 dollars and 85 cents; nor is this all. On the 15th of *August*, 1818, (being only twenty-five days after the sale, but subsequent to the commencement of this suit,) he contracts to sell the land for 4,000 dollars, and a deed was afterwards executed in pursuance of that contract, and the consideration secured.

It appears to me, that the plaintiff's lien upon the equity of redemption ought not to be defeated by the transactions which took place, and that he has pressing claims upon the Court for its assistance. There can be but one question in the case, and that is, as to the most suitable and effectual relief to be afforded to the plaintiff. The prayer is for general, as well as for particular relief; and any relief may be granted suitable to the case, and consistent with the allegations and proofs. I consider that the plaintiff is entitled to redeem, as against such a purchaser, acting with such previous arrangement with the owner of the equity of redemp-

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tion, and under such notice, equally as if his judgment had existed prior to the suit upon the mortgage. To limit the remedy to the amount of the surplus, in the hands of the purchaser, would be depriving the judgment creditor of his lien upon the equity of redemption, and substituting for it inferior personal security. And, in the next place, the surplus moneys may fall short of the amount of the judgment, though the real value of the equity of redemption might go far beyond that amount. Upon the principle which I apply to the case, and which is, that the judgment creditor under the special circumstances, has a right to redeem, notwithstanding the sale, he is entitled to his lien unimpaired, and is not to be turned over to any personal security whatsoever; nor is he, in this case, to take the sale by the master, as a test of the value of his security. He is entitled to redeem the prior incumbrance, by refunding the amount of it to the defendant *M.*, together with the costs of that suit, and by having the land disposed of to satisfy both the incumbrances.

A person who has obtained a judgment against a mortgagor, pending the suit by the mortgagee for foreclosure, and prior to the decree, was allowed to redeem, as against the purchaser at the master's sale, acting with notice of the lien of the judgment creditor, and under the circumstances of the case.

I shall, accordingly, decree a reference, to ascertain the amount due to the plaintiffs, and that the defendants pay the amount thereof, together with the costs of this suit, within thirty days after notice of this decree; or in default thereof, and upon the plaintiff's bringing into court, for the use of the defendant *M.*, the 1,080 dollars, (the amount of the mortgage debt and costs,) together with interest thereon, from the 26th day of *July*, 1818, (the time of the purchase,) and upon bringing into Court, to be cancelled, the sheriff's deed upon the sale of the mortgaged premises to the plaintiff C., on the 24th of *July*, 1818, that then, and in such case, the premises be sold by a master, on the usual notice, to satisfy the mortgage debt and costs and interest, and the amount to be reported due to the plaintiffs upon the judgment, and the 10 dollars paid on the purchase under the sheriff's sale, and the costs of this suit.

Decree accordingly.

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The PRESIDENT, DIRECTORS, and COMPANY of the NEWBURGH and COCHECTON TURNPIKE ROAD,
against
MILLER and others.

Where one has a grant of a ferry, bridge, or road, with the exclusive right of taking toll, the erection of another ferry, bridge, or road, so near it as to create a competition injurious to such franchise, is, in respect to such franchise, a nuisance: and this Court will grant a perpetual injunction to secure the enjoyment of the statute franchise, and prevent the use of the rival establishment.

The word "may," in a statute, means *must* or *shall*, in those cases only where the public are interested, and the public or third persons have a claim, *de jure*, to have the power exercised.

THE bill, which was filed *September* 2d, 1818, stated, that by an act of the legislature, passed the 20th of *March*, 1801, entitled, "An act to establish a turnpike corporation, for improving and making a road from the village of *Newburgh*, on the *Hudson* river, to *Cochecton*, on the *Delaware* river;" the plaintiffs were incorporated, and were authorized to enter on any land where they should deem it proper to construct a road, and to lay out and survey such tracts or routes as should be deemed most practicable for making a good and sufficient road; and that as soon as they should have completed the bridge over the *Wallkill*, where the said road should pass the same, it should be lawful for the plaintiffs to erect a gate and turnpike upon and across said bridge, and to demand and receive, &c. one half of the toll as granted in the said act, for every ten miles, &c.; provided the inhabitants who reside within five miles of the bridge on either side, shall be allowed to compound with the plaintiffs, by the year, for passing and using the said bridge. That the plaintiffs entered upon the lands required, and surveyed and laid out the route of the road, and had it viewed and inspected; *January* 26.

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erected toll-gates thereon, according to the said act, and the act amending the same, passed *February* 28, 1806. That the plaintiffs, in 1808 and 1809, erected and completed a *good and sufficient bridge across the Wallkill, and erected a gate and turnpike* upon and across the same, and collected toll, &c. That the said bridge was built, and is maintained at great expense and hazard; that the *Wallkill*, at the bridge, is a deep and broad stream; a map of which bridge, &c. was annexed to the bill. The bill further stated, that *Francis Fowler* and *Johannis Miller*, in conjunction with others, with intent to injure the plaintiffs, and deprive them of the enjoyment of the bridge, and the emoluments thereof, and to avoid the gate thereon, did, in 1818, erect another bridge over the said river, distant only eighty rods, by the road, from the bridge of the plaintiffs. That *F. F.* procured from the trustees of the Reformed *German* church in *Montgomery* town, in the county of *Orange*, (defendants) an instrument under their corporate and private seals, conveying to him, *F. F.*, a strip of land, three rods wide, from the bridge erected by *F. F.*, to the turnpike road of the plaintiffs. That the said church and the defendants, trustees of the church, with intent to injure the plaintiffs, in the enjoyment of their bridge, did, on the 2d of *February*, 1818, by their corporate and individual seals, grant to *F. F.* in fee, such strip of land, being part of the real estate of the said church, to be used as a public highway, and for no other purpose. That the said grant is void, being made to *F. F.* absolutely; the lands not appearing to be leased or improved for the use of the church, or conveyed for any pious use. That the conveyance purports to have been made for the consideration of thirty dollars; but no consideration was ever paid or required. That the defendants, in order to injure the plaintiffs, procured the said strip of land and bridge to be laid out by the commissioners of highways, as a *public highway*; and the order of the commissioners was recorded on the 23d of *May*, 1818. That the act of the

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commissioners of highways being appealed from, three of the judges of the Court of Common Pleas of the county of *Orange*, on the 5th of *August*, 1818, declared the act of the commissioners useless, and annulled the same; and their order of reversal was recorded the 6th of *August*, 1818, of which appeal and reversal the defendants had due notice. That on the 6th of *August*, 1818, the plaintiffs closed up the said road by a fence within the bounds of their turnpike. That on the 22d of *August*, 1818, the defendants removed the fence, by which means the travelling has been diverted to that road, to the loss of the plaintiffs, of 500 dollars. That the said by-road and bridge are unnecessary and useless, as the turnpike furnishes a better way, and the by-road is only about two chains nearer than the other, from the point where it leaves the turnpike to the point where it strikes it again. That the compact part of the village of *Montgomery*, is designated on the map annexed to the bill, and the land lying between that part and the new bridge, lies partly in common and partly improved, but has no cross streets or roads, nor are there any houses or inhabitants to be accommodated by the new bridge. That the defendants, since the order of the Judges of the Court of C. P. annulling the by-road as a public highway, have refused to shut up and discontinue such by-road and bridge, and have procured money to be raised by a vote of the town of *M.* for keeping open the road and defraying the expenses of the defendants, in resisting the rights of the plaintiffs. The plaintiffs *prayed* that the conveyance to *F. F.*, or any other relative, to the road and bridge, may be produced, and that the defendants may be restrained by injunction from supporting the by-road and bridge, or diverting the travelling from the bridge of the plaintiffs, and that the said by-road and bridge may be shut up and discontinued; and for general relief, &c.

The defendants, in their answer, stated, that *Montgomery*

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was a flourishing village, containing 600 souls, and was incorporated the 17th of *February*, 1810. That the inhabitants wished the plaintiffs to continue their road on to where *Fowler's* bridge is, and that it should cost them no additional expense; that it would have been 14 chains shorter than the other road. That for fifty years, a free bridge had been erected and kept up by the town of *M.*, across the *Wallkill*, near where the *New-York* and *Albany* state road now crosses the river. That in 1809, the plaintiffs, with a view to intercept the travel on the state road, erected their bridge close to the old bridge. That in 1814, *Benjamin Sears* applied to the trustees of the *German* church, for a right of way over their ground, from the place where *Fowler's* bridge is, to the turnpike, with intention to erect the bridge. That the church and the congregation agreed to make the grant of such right of way, as much more convenient for the church and the public; but *S.* died before the grant was made, or the bridge built. That *J. Fowler* renewed the application, and the grant was made to him on the 2d of *February*, 1818, for the consideration of thirty dollars. That *Fowler* afterwards erected the bridge. The trustees denied that the grant was made with a view to injure the plaintiffs, or to divert the travelling from their road and bridge, or to evade the toll; but that the grant was made to benefit the land of the church, and for the accommodation of persons attending public worship in their church. That on the 16th of *May*, 1818, the road was duly declared a public highway, by the commissioners and recorded; but the order being appealed from, was annulled, as charged in the bill. That the road was beneficial to the village, and to the church land; and if shut up, the value of the lots in *Harmony-street* would be diminished one half. They admitted, that the plaintiffs put up the fence, on the 6th of *August*, 1818, but they denied that they removed it, or aided in its removal. They admitted, that when *Fowler's* bridge was open-

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ed, there was some travelling over it, by which the plaintiffs lost some toll; but they averred that *F.*, and the persons interested in the adjacent lands, had a right to keep open the road, as a private way, and that it is necessary to the convenience and extension of the village. That it is a shorter way by at least 10 chains and an half, and much better for travelling. They admitted, that the inhabitants of *M.*, at a regular town meeting, by a large majority, voted 200 dollars to be employed in defending their common rights, and that a committee of the inhabitants attended before the judges on the appeal, and offered evidence of the greater benefit of the road by *Fowler's* bridge to the village. That the inhabitants would have removed the proceedings in that suit, into the Supreme Court, had they not been prevented by the injunction issued by this Court. That on the 17th of *March*, 1815, an act was passed, on the application of the plaintiffs, authorizing them to remove the toll-gate from their bridge, and to receive from the first toll-gate west of the bridge, the same rate of toll as for twelve and a half miles; and the additional toll for passing their bridge is laid on the next gate, which is all the compensation they ought to receive; and they ought, pursuant to the act, to remove their gate from the bridge. That the defendants supposed that it was the intention of the plaintiffs to remove the gate from the bridge, and they, therefore, contributed money to build *Fowler's* bridge, and make the new road; but the plaintiffs are suffering the bridge to go to decay, and it will soon fall, unless repaired. That the *Wallkill*, at the bridge, is a sluggish stream, about three feet deep, with a gravelly bottom, and never rises above six feet. The defendants prayed that the injunction might be dissolved.

Many witnesses were examined upon both sides; but it is not necessary to detail their evidence.

Betts, for the plaintiffs.

Slosson, for the defendants.

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THE CHANCELLOR. This is a suit to enjoin the defendants from disturbing the plaintiffs in the enjoyment of their toll-gate on the bridge over the *Wallkill*, at the village of *Montgomery*, and to shut up the private road and bridge designated on one of the maps in the cause, by the letters *R. O. J. L. M. N. K.*

The following are the most material facts in the case: The plaintiffs were incorporated by an act of the legislature, passed the 20th of *March*, 1801, (sess. 24. ch. 36.) for the purpose of making "a good and sufficient road, to run in the nearest, most convenient, and direct route, as far as circumstances would admit, from the village of *Newburgh*, on *Hudson's* river, to *Cochecton*, on the *Delaware* river." The corporation so created was authorized to "enter into and upon any land where they should deem it proper to construct the said road, and to lay out and survey such tracts or routes as should be deemed most practicable, for making a good and sufficient road between the places aforesaid." But they were not authorized "to make the said road through any garden, without the consent of the owner, if such garden shall have been cultivated as such, at least ten years before such road shall be laid out." And as soon as the plaintiffs should have "completed the bridge over the *Wallkill*, where the said road should pass the same, it should be lawful for the corporation to erect a gate and turnpike upon and across said bridge, and to ask, demand, and receive, of and from all and every person and persons who should pass over and use the said bridge, one half of the tolls and duties," &c. Provided, those inhabitants who resided within five miles of the said bridge, on either side, should be allowed to compound with the president and directors, by the year, for passing and using said bridge." And there was a further *proviso*, "that nothing in the act should be construed to entitle the corporation to demand toll of or from any person passing to or from public worship, on Sunday," &c. And it was further provided, "that if any person or persons should,

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with his or their team or teams, carriage, or horse, turn out of said road, to pass any or either of the gates, on ground adjacent thereto, and again enter on said road, having passed the said gate or gates to avoid the payment of the toll due by the act, such person or persons should forfeit and pay a fine not exceeding 5 dollars," &c.

In pursuance of the provisions of this act, a turnpike road was duly laid out, inspected, and passed, and gates erected in 1804; and in passing through the village of *Montgomery* the road crossed the *Wallkill*, or, at least, on one side touched the *Wallkill* at, or very near the spot where the old bridge stood, and where the road had crossed it for nearly half a century before. The turnpike road so laid out and crossing the *Wallkill*, is designated on the map above referred to by the letters *D. A. B. E. F.* The road so laid out, appears to have been judiciously located, under the existing circumstances of the case, in 1804, and probably to the satisfaction and the best accommodation of the public at that time. There were difficulties and obstructions not easily to have been surmounted, in carrying the road directly on from the place on the map designated by *R.* or *D.*, westerly, to the *Wallkill*; and the shortening the distance a few rods was of no consequence to the public.

A supplementary act was passed in favour of the plaintiffs, on the 28th of *February*, 1806, (sess. 29. ch. 29.) and before any new bridge had been erected by the plaintiffs over the *Wallkill*. By this act, the plaintiffs were authorized, when a good and sufficient bridge across the *Neversink* river should have been completed, to place upon and across such bridge a gate and turnpike, and to ask and demand one half of the toll and duties allowed to be demanded "for passing a gate to be erected on the bridge to be built over the *Wallkill*." The plaintiffs, in consideration of the toll to be taken on the *Neversink* bridge, were entitled to demand of any person "passing the gate to be erected on the bridge over the *Wallkill* river, when the same is built, only one half

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the toll and duties allowed to be demanded by the former act."

It is to be observed, that this act was passed about two years after the road had been laid out nearly as it now leads over the *Wallkill*, and we are to presume that location was well known to the legislature, it being a matter of public notoriety; and this act was an implied recognition of that road, for the purpose of the bridge.

The bridge was made and finished, and a toll-gate established upon it, in 1809, and from that time to the commencement of this suit, the plaintiffs have been in the exercise of the right to the bridge, and the toll-gate erected on it.

In 1810, the inhabitants of the village of *M.* were incorporated for local purposes; and in 1812, the trustees of the village laid out, into streets and squares, the ground N. W. of the inhabited part of the village, and between it and the *Wallkill*.

On the 17th of *March*, 1815, (sess. 38. ch. 79.) another act was passed in relation to the plaintiffs, in which it was made "lawful for the president, directors, and company to remove the toll-gate from off the bridge at the village of *Montgomery*, and to ask, demand, and receive, at, and from all persons passing the first gate west thereof, the same rate of toll, as for twelve and an half miles of the said road." A similar provision was made in respect to the gate on the *Neversink* bridge.

The plaintiffs have not as yet availed themselves of this power to remove their toll-gate on the *Wallkill* bridge, and to increase their rate of toll at another gate, but in respect to that bridge, they have continued to exercise the rights and privileges conferred by the former statutes.

About the time of the passage of this last act, *Benjamin Sears* was the principal owner of the grounds so laid out by the trustees, to the N. West of the village, and he had it in contemplation to open a road and erect a free bridge over the *Wallkill*, at the place where the road and bridge,

designated in the case as *Fowler's* bridge, have been since made. There can be no doubt that the object of Mr. *Sears* was to increase the value, and to make better sales of the lots and grounds so lying to the N. W. of the village. After his death, his intentions which had been partly executed by him, were carried into full effect by *Francis Fowler*, with the countenance and assistance of the defendants and others; and about three or four years ago, the bridge complained of was built. *Fowler* obtained a grant from the defendants, who are trustees of the *German* church, on the 2d of *February*, 1818, for a strip of land three rods wide, from the bridge built by him, westerly, to the turpike road of the plaintiffs, and the grant was made expressly for the purpose of a public road. The words of the grant were, "to use and occupy the same as a public highway, and not otherwise." In *May*, 1818, the new road so laid out was declared by the commissioners of the highways, of the town of *Montgomery*, upon due application by twelve freeholders, to be a public highway. But on appeal to three judges of the Court of Common Pleas, according to the provisions of the highway act, the premises were inspected, and the allegations and proofs of the parties in interest heard, and the road declared to be unnecessary and inexpedient, and the order of the commissioners was annulled.

Upon these facts, connected with a number of circumstances in proof, (but which do not materially affect the question of right or of remedy,) the subject for consideration and decision is, whether the plaintiffs are not unlawfully disturbed in the enjoyment of their toll-bridge, and whether it be not a case calling for the interposition of this Court?

I shall lay out of view, as altogether inapplicable to the question of right, how far the new road and bridge have an influence upon the value of property within their vicinity, and how far the extension of the village in that direction may be accelerated or retarded by the continuance or removal of the new bridge. If the road of the plaintiffs was

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laid out across the *Wallkill*, at the place where their bridge now stands, within the intent and meaning of the acts by which they were authorized to establish a road and toll-bridge, then the plaintiffs are in the enjoyment of a franchise or statute privilege, of which they cannot be devested by such considerations. Nor can the state or condition of either bridge, be a matter of any moment in the decision of this case, unless, indeed, the bridge of the plaintiffs was so far out of repair as not to afford a passage with ordinary convenience and safety. The evidence, however, does not warrant any such conclusion, and the statute of the 10th of *April*, 1813, (sess. 36. ch. 91.) affords a prompt and effectual remedy, if the case existed. It is enacted by the statute last referred to, that the commissioners for inspecting turnpike roads, whenever complaint is made to them that any turnpike road is out of repair, (and the bridge in question is to be taken as part of that road,) shall examine the road, and if they discover the road not to be in good repair, "or shall find any of the gates placed in situations contrary to law," they shall give notice to the Company of such defect or default, and if they do not immediately repair the defect, remove the gate, or throw open the gate, as the case may require, they are subjected to prosecution and penalty. It must be admitted, upon the view of this case, that the plaintiffs are in possession of a franchise granted by statute, and that the title to it has not been duly questioned; and the only inquiry is, whether the new road and bridge be not a disturbance of it, by hindering or disquieting the plaintiffs in the regular and lawful enjoyment of their toll.

The bridge of the plaintiffs is part of their road, and the gate upon that bridge is entitled to equal protection with any gate upon their road. Considering the proximity of the new bridge, and the facility that every traveller has, by means of that bridge and the road connected with it, to

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shun the plaintiff's gate, which he would otherwise be obliged to pass, I cannot doubt, for a moment, that the new bridge is a direct and immediate disturbance of the plaintiffs in the enjoyment of their privilege. The *quo animo* is not an essential inquiry in the case. Whatever may have been the intention of the defendants, the new road and bridge do directly and materially impair the use and value of the plaintiffs' franchise. It is a case, therefore, proper for the special interference of this Court, to relieve the plaintiffs from a great evil, or the necessity of incessant litigation with travellers. They bring themselves within the case of the *Croton Turnpike Company* v. *Ryder*, (1 *Johns. Ch. Rep.* 611.) and are entitled, within the doctrine of that case, to be quieted in the enjoyment of their right.

There is some little difference between the parties, as to distances, in respect to the two roads, but the difference is so inconsiderable, as to become perfectly immaterial. Whether the road be not shortened at all, or from two to fourteen chains, in a distance of about three-fourths of a mile, cannot alter the rights of the parties. The distance may be lessened a few rods by the new road, but the proximity of the new road, and the proximity of the two bridges, is so close and striking, as to render the same a most palpable and immediate annoyance and interruption to the enjoyment of the plaintiffs' toll-bridge. The new road, by its *termini*, and its vicinity, creates a competition most injurious to the statute franchise, and becomes, what is deemed in law, in respect to such a franchise, a nuisance. It was observed, in the case of *Ogden* v *Gibbons*, (4 *Johns. Ch. Rep.* 150. 160.) and shown to be a principle of the common law, that if one had a ferry by prescription, and another erected a ferry so near it, as to draw away its custom, it was a nuisance, for which the injured party had his remedy by action. The same law and remedy were applied to the case of a fair or market, in which an individual had a freehold interest, if

Where one has a grant of a ferry, bridge, or road, with the exclusive right of taking toll, the erection of another ferry, bridge, or road, so near it, as to create a competition, injurious to the franchise, it is in respect to such franchise, a nui-

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another fair or market was erected or used within its vicinity. The same doctrine applies to any exclusive privilege created by statute: all such privileges come within the equity and reason of the principle; no rival road, bridge, ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration by which individuals are invited to expend money upon great, and expensive, and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, is the grant of a right to an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means, devised for the purpose, both of which are equally unlawful.

sance. And this court will grant a perpetual injunction, to secure the enjoyment of such statute franchise, and prevent the use of the rival establishment.

But it has been contended, that the plaintiffs were bound by the act of 1815, to remove their gate from the *Wallkill* bridge. The words of the act are, "that it shall and may be lawful" for the president, directors, and company, to remove the toll-gate, &c. and to demand an increased rate of toll at the first gate west thereof. These words were applied to the trustees of a private company, and the better construction is, that it was intended as a matter of accommodation to the plaintiffs, to allow them to remove one gate, and increase their rate of toll at another. The increase of the toll was intended as a compensation for the removal of the gate; but the statute seems to have intended to leave it to their discretion, whether or not they would avail themselves of the permission. A peremptory and imperative interference of that kind, with a vested private right, is not to be inferred, when it is not expressly declared. Until the plaintiffs have accepted of the modification proposed, either by voluntarily removing the gate from the bridge, or by demanding the increased toll at the next gate, all their former rights are to be deemed unimpaired, and as continuing in

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full force. Lord *Hardwicke* observed, in *Stamper* v. *Miller*, (3 *Atk.* 212.) that the words *shall* or *may*, when applied to private trusts, leave an election to the trustees, which is not the case when the words are used in acts of parliament. And in respect to statutes, the rule of construction seems to be, that the word *may* means *must* or *shall* only in cases where the public interest and rights are concerned, and where the public or third persons have a claim, *de jure*, that the power should be exercised. Thus it was held in *Alderman Backwell's case*, (1 *Vern.* 152.) that the Chancellor was bound to grant a commission of bankruptcy, on due application and proof, though the words of the statute were that he *may* grant. The creditors had an interest in the application of the power. So, in the case of the *King* v. *Barlow*, as it is reported in *Salkeld*, (for in *Carthew* the distinction is not noticed,) the K. B. construed the words *shall* and *may*, as being mandatory "where the statute directs the doing of a thing for the sake of justice, or the public good." In that case, (2 *Salk.* 609. *Carth.* 293.) the churchwardens were indicted for not making a rate or assessment, under the statute of 14 *Car. II.* ch. 12. sec. 18., for the reimbursement of some constables. The statute said, they "shall have power and authority to make a rate," and the statute was construed to be peremptory, and the constables had an interest in the exercise of the power. The Court observed in that case, that the stat. of 23 *H. VI.* said, that the sheriff *may* take bail, which was construed he *shall*. A similar decision was made in the case of the *King* v. *Inhabitants of Derby*, (*Skinner*, 370.) where it was said, that *may*, in the case of a public officer, was tantamount to *shall*. The illustration, in one of those cases, taken from the statute of 23 *H. VI.* was rather unfortunate, for the words of that statute were imperative. The sheriff "*shall* let out of prison, &c. upon reasonable sureties," &c. But the principle to be deduced from the cases, is, that whenever an act to be done under a statute,

The words "shall or may," in a private trust, leave it optional with the trustees.

The word "may," in a statute, means *must* or *shall* only in cases where the public interest is concerned, and the public or third persons have a claim, *de jure*, that the power should be exercised.

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is to be done by a public officer, and concerns the public interest, or the rights of third persons, which require the performance of the act, then it becomes a duty in the officer to do it. But that doctrine has no necessary application to a case like the present, where the power is conferred on trustees, upon their own application, as it is to be presumed, and who are not public officers, and where neither the public nor third persons have any rights, directly or immediately, concerned in the case. This is more like the case mentioned by Lord *Hardwicke*, of a power conferred upon trustees, for purposes of a private or personal nature; and at any rate, until the plaintiffs either voluntarily relinquish their gate upon the bridge, or are duly convicted by the judgment of a Court of law, of usurping or unlawfully holding that particular privilege or franchise, (and such a jurisdiction does not belong to this Court,) I shall deem myself bound to regard them as in the lawful exercise of a right.

The decision of the judges of the Court of Common Pleas is very material, (not indeed in respect to the rights of the plaintiffs, which it was not in the power of the commissioners of highways to affect or impair,) but in respect to the justice and equity of the case. The judges, upon appeal, had a view of the ground, and heard the allegations and proofs of the parties, and they adjudged that the new road and bridge were unnecessary and inexpedient. This decision is evidence of the unreasonableness of the disturbance, of which the plaintiffs complain. They are now contending against a private road, which not only greatly annoys them in the quiet enjoyment of their privilege, conferred for beneficial purposes, and purchased for a valuable consideration, but which has been judicially declared to be unnecessary and inexpedient.

The plaintiffs are, accordingly, entitled to a perpetual injunction against the use of the road and bridge, opened by the aid of the defendants. The trustees of the *German* church are entitled to the land which was granted by them

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to *Fowler*; for the condition of the grant has failed, and the title reverts back to them, and they ought to reclaim that land from the unwarrantable use to which it has been applied.

Question as to damages and costs.

With respect to the damages claimed by the plaintiffs, for the loss of toll, and with respect to the question of costs, the act of 1815 is entitled to consideration, as having an influence upon those questions. I can easily suppose that the defendants acted under a misapprehension of right, when they lent assistance to *Fowler*, in the erection of the bridge, and made a grant to him of the road west of the *Wallkill*; and I think that the act of 1815 raised a fair presumption, that the plaintiffs intended to avail themselves speedily of the permission thereby granted. If it had not been their intention, it is difficult to perceive a motive for passing the act, for I have no doubt it was passed upon their suggestion. The plaintiffs, since that time, have not paid very vigilant attention to their bridge, and this must have strengthened the presumption. Nor does it appear that the plaintiffs made any objection to *Fowler's* bridge, while it was building, or gave any notice of their intention to oppose the use of it. Under all these circumstances, I am not inclined to make the defendants responsible for the loss of toll occasioned by the use of *Fowler's* bridge. They have disclaimed all concern in the act of opening the road, after it had been closed by the plaintiffs. The damages must be very uncertain, and every thing that was said on that subject by the witnesses was mere guess and conjecture. I do not think the plaintiffs have laid a strong foundation for the assistance of this Court, in respect to damages, or shown any reasonable *data*, by which they might be accurately and safely assessed. The defendants have, likewise, shown too much colour of excuse, for the assistance they afforded to *Fowler*, and the plaintiffs have been too inattentive spectators of the formation of the bridge and road, during the long time that the business

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was going on, to justify me in punishing the defendants with the costs of this suit.

The following decree was entered: "It is declared that the plaintiffs are in the lawful possession of the gate and turnpike, erected upon the bridge over the *Wallkill*, and in the pleadings mentioned, and are entitled to the exclusive enjoyment of the toll, for passing the said bridge, given to them by the acts in the pleadings referred to, of the 20th of *March*, 1801, and of the 28th of *February*, 1806; and that the permission given to the plaintiffs by the act of the 17th of *March*, 1815, also, in the pleadings mentioned, to remove the toll-gate from the said bridge, was not intended to be compulsory upon them to remove the said toll-gate, nor to impair their previous right to ask, demand, and receive toll at the said bridge, until they should, by their own voluntary act and consent, have removed the said toll-gate. And it is further declared, that the erection of the bridge denominated, in the pleadings and proofs, *Fowler's* bridge, and the opening of the road therefrom, west of the *Wallkill*, and leading to the turnpike road of the plaintiffs, enables persons travelling upon the road of the plaintiffs to avoid the toll-gate, and to re-enter upon the road within a shorter distance than a mile from the place at which they had quitted it, and consequently the said bridge, denominated *Fowler's* bridge, and the road leading therefrom as aforesaid, are an unjustifiable and unlawful interruption and disturbance of the plaintiffs, in the enjoyment of their statute right and privilege, to demand and receive toll as aforesaid. And it is further declared, that the defendants, by having afforded aid towards building *Fowler's* bridge, and such of them as were trustees of the Reformed *German* church, by having granted land for the sole purpose of the said road, have been and are still contributing to the said injury to the plaintiffs. It is thereupon ordered, &c., that the defendants, and all persons by, from, or under them be enjoined, so long as the plaintiffs shall continue the toll-

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gate on their bridge as aforesaid, from using, or suffering, or permitting to be used, as a road for public use or travel, *Fowler's* bridge aforesaid, or the road there from, west of the *Wallkill*, and leading to and from the said turnpike road over land belonging to the trustees of the Reformed *German* church, and which land hath reverted to them upon failure of the condition upon which the same was granted by them to *Francis Fowler*. And it is further ordered, &c., that the said road last mentioned be forthwith, upon service of a copy of this decree upon the said trustees, by them closed up so far as to hinder persons travelling upon the turnpike road of the plaintiffs, from using the same and *Fowler's* bridge connected therewith, to the avoidance of the toll-gate aforesaid, on the bridge of the plaintiffs. But inasmuch as it does not appear that the defendants acted with any fraudulent or malicious intent to injure the plaintiffs, in the lawful enjoyment of their rights, but rather from a misapprehension of their own rights in that respect: And inasmuch as the act of the 17th of *March*, 1815, afforded a reasonable permission, that the plaintiffs intended, in due season, to avail themselves of the permission thereby granted to them, (for otherwise that presumption was granted without any notice,) and as the plaintiffs do not appear to have made any objection or opposition to the new bridge and road, during the period the same were making, it is thereupon further declared, that the plaintiffs have not shown sufficient ground for the equitable interposition of this Court, to charge the defendants with the uncertain damages which the plaintiffs may have sustained in the loss of toll, or to charge them with the costs of this suit. It is thereupon further ordered, &c., that no costs of this suit be allowed to either party, as against the other."

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SMITH and others *against* CARLL and others.

This Court has original jurisdiction, to be exercised in a sound discretion, to try all questions of fact, without the intervention of a Jury. It is not bound, except on bills of divorce, for adultery, or an issue of *devisavit vel non*, to send a matter of fact to be tried by a jury, if it can decide, of itself, to its own satisfaction upon the evidence; the aid of a jury being merely to inform the conscience of the Court.

BILL by the plaintiffs, as a committee of the person and estate of *Thomas Hallock*, a lunatic, stating that *H.* was duly found to be a lunatic, by a commission of lunacy, executed in *June*, 1818; and that he had been so, from the 30th of *March* preceding; and praying that a purchase of land which he had made of the defendants on the 14th of *April*, 1818, might be rescinded. Issue was joined, and the testimony of a great number of witnesses, on each side, was taken, touching the sanity of the lunatic at the time of the purchase. The cause was brought to a hearing, on the merits, in *November* last. A decree was entered on the 29th of *December* last, declaring that *Thomas Hallock* was not of sound mind, or mentally competent to make the purchase, on the 6th of *April*, 1818, when the parties contracted, or on the 14th of *April*, 1818, when the contract was consummated and the deed executed to the lunatic, and his bond and mortgage given in return. The deed, bond, and mortgage were declared to be null and void, and ordered to be delivered up and cancelled. A motion was now made for a rehearing, on the ground that a feigned issue ought to have been awarded to try the question of sanity, and *Thomas Hallock*, upon such issue, found to have been insane, before a decree could be pronounced declaring the purchase void; and that further testimony might and could be procured on the part of the defendants.

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H. W. Warner, for the motion.

Wells, contra. He read an affidavit, stating that the counsel upon the argument agreed that the Chancellor was to decide the issue upon the testimony produced; and that a feigned issue was not asked or required, unless the Chancellor should deem it necessary for his own satisfaction.

THE CHANCELLOR denied the motion for a rehearing on the point of insanity, and declared that the testimony was entirely satisfactory to him on that point, and that a feigned issue was not indispensable, but rested in discretion. It is settled, he said, to be a competent exercise of the authority of the Court, in every case and in every stage of it, to determine according to its discretion, whether it does or does not want the assistance of a jury. Courts of Equity have an original jurisdiction, which must be exercised according to a sound discretion, to try questions of fact without the intervention of a jury, whose aid is sought, according to the common expression, for the purpose of informing the conscience of the Court. The Court is never bound (except it be on the issue *devisavit vel non*, or on bills for a divorce for adultery,) to send a matter of fact to be tried by a jury, if it can, to its own satisfaction, decide itself upon the evidence. (Lord *Eldon*, in 3 *Vesey & Bea.* 42. 1 *Dow*, 318. 320. 330.)

The cases of *Clerk* v. *Clerk* (2 *Vern.* 413.) and of *Addison* v. *Dawson* (2 *Vern.* 678.) serve to illustrate every part of the proposition. In the first of these cases, there was a bill to set aside a settlement by a lunatic, who had been declared a lunatic under a commission, and which found that he had been so, continually, for a period reaching back beyond the settlement. Lord Keeper *Wright*, in that case, directed an issue, "there not being any sufficient proof of his being a lunatic, and the settlement having been ac-

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quiesced in." In the other case, the inquisition overreached the period when the defendant had made a purchase from the lunatic. *The defendants insisted on a trial at law*, but the Court (Lord Chancellor *Cowper*) set aside the purchase, on a bill filed by the committee of the lunatic. This last is a case entirely in point.

These are numerous cases in which a Court of Equity has set aside conveyances from persons of weak or diseased intellects, without referring the case to a jury; and all such cases, like the present one, rest upon the exercise of the same undoubted jurisdiction and discretion of the Court. (*Clarkson* v. *Hanway*, 2 *P. Wms.* 203. *Bennet* v. *Wade*, 2 *Atk.* 324. *Wright* v. *Proud*, 13 *Vesey*, 136.) In *Hall* v. *Warner*, (9 *Vesey*, 605.) a bill was filed for a specific performance of a contract overreached by a commission of lunacy. The answer of the committee set up lunacy, at the time of the execution of the contract. The counsel for the plaintiff, at the hearing, pressed for an issue, and the Master of the Rolls directed an issue, but he considered it a doubtful case, upon the testimony, and observed, "I should certainly refuse, upon the evidence before me, to determine that he was not a lunatic; and as to a lucid interval, I should upon this evidence hesitate considerably."

But the case of *Evans* v. *Blood*, (4 *Bro. P. C.* 557.) decided upon appeal in parliament, in 1746, is conclusive upon the question, touching the power of the Court to decide upon the question of insanity, without reference to a jury. In that case, the lunatic executed an assignment of a lease to the appellant, and a commission of lunacy was afterwards taken out against him, and he was found, by inquisition, to be a lunatic, and to have been so from a period overreaching the assignment. A bill was filed by the committee of the lunatic, to set aside the assignment, and to compel the appellant to account for the profits. Issue was joined, and a number of witnesses examined in respect to the lunacy, and after a hearing of six days, the Court of Equity in *Ireland*

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set aside the assignment, and directed the appellant to account. From this decree, he appealed to the *English* House of Lords, and insisted that no instance could be found where a Court of Equity had made a decree upon the ground of lunacy, without a trial at law. On the other side, it was contended, that the awarding of an issue would have been entirely useless and vain, as the insanity was fully proved. The Lords were of this opinion, and affirmed the decree, and ordered the appellant to pay costs.

In the present case, the evidence was sufficiently satisfactory; and there was no intimation, at the hearing, that an issue would be wanted. The counsel for the defendants, in their points, submitted the fact of lunacy entirely to the Court, and claimed the benefit of a reference, as to the use and occupation of the premises, in case the contract and conveyances should be set aside. The proof on each side was voluminous, and there was no suggestion that further proof remained behind. But the affidavit of Mr. *Wells* shows also, that the question of an issue was expressly waived upon the argument.

Motion denied as to the question of insanity; though a rehearing was awarded upon another point, which, however, assumed the deeds to have been properly set aside.

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FARMER *against* DURHAM.

Where *D.* lent *F.* his promissory notes, and received the notes of *F.* for the same amount, in exchange, and also a *commission of two and an half per cent.*, which exceeded the legal interest for the time the notes had to run, the transaction was held to be usurious, and the notes and other securities given by *F.* void.

If the lender of money, on an usurious contract, seeks to enforce his securities in this Court, and the borrower sets up the usury as a defence, and proves it, the securities will be declared void, and ordered to be delivered up and cancelled. But where the lender has proceeded at law, and recovered a judgment, on a bond and warrant of attorney, or is proceeding to foreclose a mortgage, by virtue of a power of sale, under the statute, without the aid of this Court; and the borrower files his bill for relief against the judgment or other legal securities, on the ground of usury, he must, before he can be entitled to relief, pay or offer to pay the principal and interest lawfully due; and that, whether the usury be established by proof, or admitted by the defendant's answer.

Dec. 1, 1820, and *Feb.* 10, 1821.

THE bill, filed *August* 2, 1813, stated, that on the 26th of *October*, 1811, the plaintiff and defendant, who had dealings together in the exchange of promissory notes, &c. entered into a written agreement, which recited that the defendant had advanced to the plaintiff, at sundry times, his promissory notes in exchange, amounting to 188,464 dollars and 88 cents, and for which the defendant was entitled to a commission of *two and an half per cent.*; and a further advance of 20,000 dollars, in exchange of notes, was agreed upon, in four notes, payable in 2, 3, 4, and 5 months, with the privilege of one renewal; and also, the further advance of 25,000 dollars, in the notes of the defendant, payable at 6, 7, 8, and 9 months, with notes of the plaintiff in exchange, subject to a commission of two and an half per cent., as well as the said renewals; and thereupon, the plaintiff, in consideration of the above advantages, assigned to the defendant

all his right to the ship *Bordeaux* and cargo, the ship *The Plant* and cargo, and the schooner *Brothers* and her cargo, which those vessels were then on foreign voyages, and it was agreed that the plaintiff's interest in the said vessels and cargoes should be sold by the defendant at auction, on their arrival; and if the commissions of two and an half per cent. on the said sums, should be equal in amount to the several sums above stated, then no other charge, more than the defendant's interest at seven per cent., and all necessary charges, as auction duty, storage, &c. should be made to the defendant; but if the goods did not amount to that sum, or not arriving, then the plaintiff guaranteed to the defendant his full commissions on any deficiency that should so occur; and the defendant was to have full power to take possession of the interest of the plaintiff on the arrival of the vessels, and to dispose of the same or hold it, at his discretion, accounting to the plaintiff for the surplus, first deducting his own demand, due by that or any former agreement.

That in the spring and summer of 1812, the plaintiff, finding it necessary to raise money, applied to the defendant, who, from time to time, advanced the plaintiff his notes, in exchange for the plaintiff's notes, and his endorsements on the plaintiff's notes, amounting to 103,678 dollars and 16 cents. And it was agreed between them, that the plaintiff should pay to the defendant a commission of two and an half per cent. on the amount of all such notes and endorsements; viz. the plaintiff was to put into the hands of the defendant, (an auctioneer,) goods to be sold at auction by the defendant, and out of the proceeds he was to retain the commission of two and an half per cent. on the amount of all such notes and endorsements by him advanced, over and above the usual commissions, expenses, and charges, upon such sales made at auction, if such proceeds on sales should be sufficient for the purpose; and if not, the balance or deficiency should be made up and paid by the plaintiff to the

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defendant. That as a condition of this last agreement, the plaintiff, upon receiving the notes and endorsements of the defendant, always gave his own notes to the defendant, in exchange for the amount of his notes and endorsements, payable respectively, in each instance, one day before the day on which the notes of the defendant, or the notes of the plaintiff, endorsed by him, were payable.

That on the 9th of *March*, 1812, to secure to the defendant payment of his notes and endorsements and his commission thereon, the plaintiff assigned to him one hundred shares in the *West Chester Manufacturing Society*; and on the 27th of *April*, 1812, for the same purpose, the plaintiff gave to the defendant a bond conditioned to pay 100,000 dollars, with a warrant of attorney to confess judgment thereon; but no judgment was to be entered, until there was a default of the notes or endorsements; and on the 12th of *May*, 1812, the plaintiff, for the same purpose, gave to the defendant another bond conditioned to pay 30,000 dollars, and also, a mortgage by him and his wife, on lands at *New Rochelle* and *Pelham*, in the county of *West Chester*.

That on the 27th of *August*, 1812, the defendant gave to the plaintiff a declaration or deed of trust, reciting that the plaintiff was indebted to him in the sum of 43,818 dollars and 30 cents, in promissory notes therein specified, and for securing the amount of those notes, and such other moneys as the plaintiff owed, or might owe to him by the renewal of the said notes, or otherwise, the defendant held the said bond and mortgage, the one hundred manufacturing shares, the ship called the *Zephyr*, one-third of the ship *Tea Plant*, and the said bond and warrant of attorney; and that when the notes and other moneys were paid the bond and mortgage should be cancelled, and the other property given up or re-assigned to the plaintiff. To this deed was annexed a schedule of the notes. That the last mentioned writing was given in lieu of, or as a substitute for, the agreement of the 26th of *October*, 1811. The bill set forth the exchange of

several notes between the parties, and that the plaintiff gave the defendant a note for 229 dollars and 47 cents, with an endorser, for the commissions, or premium thereon. It then set forth other exchanges of notes, and that the defendant's notes were less than the plaintiff's, by the amount of the commission of two and an half per cent. That other exchanges of notes took place; and that on the 21st of *August*, 1812, the plaintiff gave to the defendants six promissory notes, with an endorser, amounting to 6,898 dollars and 20 cents, all of which were exclusively given for premiums or commissions on the exchanges of notes, as stated in the bill, that sum being the balance, after crediting the amount of sales of the goods of the plaintiff at auction. That several of the notes mentioned in the schedule, besides one of the *premium* notes for 1,149 dollars and 70 cents, were paid by the plaintiff, when they fell due. The bill charged that the defendant had no other notes or demands against the plaintiff, but such as were specified in the schedule, taking out such as were before specified as paid; and that all the notes remaining unpaid were *usurious* and *void in law*; and that the bond and warrant of attorney, the bond and mortgage, the assignments of ships and shares held as security for the payment of those notes, were also void in law. That on the 18th of *December*, 1813, before any of the notes became due and remained unpaid, the defendant fraudulently entered up a judgment on the said bond and warrant of attorney, in the Supreme Court, and issued an execution thereon to the sheriff of the city of *New York*, with a direction thereon endorsed, to levy 37,505 dollars of debt, and the costs. That in *January* term, 1813, of the Supreme Court, the plaintiff applied to that Court, who ordered the execution to be set aside, and awarded a feigned issue between the parties, to try whether the bond and warrant of attorney, and the notes for which they were given as collateral security, were not founded on usurious contracts or considera-

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tions. That the plaintiff caused the feigned issue to be made up, and gave notice of the trial thereof at the *King's Circuit*, in *June*, 1813, but the trial was put off by the defendant. That the defendant, in *February*, 1813, fraudulently advertised the mortgaged premises for sale at auction, by virtue of the power contained in the mortgage. That he also advertised and sold at auction, one third of the ship *Tea Plant*, so assigned as security, and fraudently and by force dispossessed the plaintiff. The bill prayed for an injunction against the defendant from proceeding at law on the mortgage, or selling under it, and from sending the *Tea Plant* to sea, assigning the notes and other securities, &c. &c., and for general relief.

The feigned issue having been tried, and a verdict found for the plaintiff, he filed a *supplemental* bill, on the 5th of *April*, 1819, stating the substance of the original bill, and that after the feigned issue was made, but before it was tried, this Court, on the 7th of *December*, 1813, ordered the injunction, so far as it prohibited the defendant from selling the mortgaged premises, to be dissolved, unless the plaintiff should, within eight days, bring the money due on the mortgage into Court; and that on the 16th of *December*, 1813, the plaintiff appealed from that order, to the Court for the Correction of Errors; but it was, afterwards, agreed between the parties, that proceedings on the appeal should be suspended until after a decision on the feigned issue. That the feigned issue was settled, under the directions of the Supreme Court, and the pleadings were set forth in the bill, at length. That the feigned issue was tried before Mr. Chief Justice *Thompson*, at the sittings, in *June* 1815, when the jury found all the issues in favour of the plaintiff; and the bill set out the *postea*, at length, by which it appeared that the jury found that the said bond and warrant of attorney were made and executed upon an usurious consideration; that the said bond and warrant were made as

collateral security, for certain promissory notes made by the plaintiff to the defendant, upon usurious considerations, or upon other engagements and transactions between the parties upon usurious considerations, and that the said promissory notes, for which the bond and warrant of attorney were given as collateral security, were respectively made and delivered upon usurious considerations. That to maintain the feigned issue, the plaintiff gave in evidence the bond and warrant of attorney, the judgment entered thereon, the instrument executed by the defendant, *August* 27th, 1812, and the schedule (A.) thereto annexed, the answer of the defendant to the original bill, and the cross examination of the defendant's witnesses. That after the verdict, the defendant made a *case*, on which to move for a new trial of the feigned issue; that a motion for a new trial was accordingly made and argued in *October* term, 1817, and that Court, in *January* term following, unanimously refused to grant a new trial. That before the *case* was settled, an agreement, dated 7th of *May*, 1816, was entered into between the counsel of the parties respectively, that the defendant might have a bill of exceptions prepared and signed and sealed, in the same manner, as it it had been tendered at the trial of the feigned issue, to the end that a writ of error might be brought, if either party thought proper, and that the decision which should be pronounced on such bill of exceptions, should be final and conclusive upon all matters put at issue, by such feigned issue between the parties. That although the Supreme Court decided against the defendant, he never thought proper to take a bill of exceptions under the said agreement, and bring a writ of error; but has expressly declined doing so. That the writing of the 27th of *August*, 1812 and the schedule A. annexed thereto, and the bond and warrant of attorney, are the same as are set forth in the original bill. That according to the agreement of the 7th of *May*, 1816, the verdict and judgment on the feigned issue, as no writ of error has been

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brought, conclusively establish the fact, that the said promissory notes and other securities, held by the defendant, are usurious and void; notwithstanding which the defendant still holds the notes and securities, and refuses to give them up, but declares his determination to enforce the payment of the moneys for which the notes, &c., were given. That on the 31st of *October*, 1818, the Supreme Court, by an order, rescinded the order for a feigned issue, and all proceedings thereon, and directed all further proceedings on the judgment against the plaintiffs to be stayed, until the further order of the Court. That in *January*, 1819, the Supreme Court allowed the defendant to take out execution on the judgment.

That the appeal from the order to dissolve the injunction had been dismissed for want of prosecution. The supplemental bill prayed a similar injunction to the one originally granted, &c., and for general relief, &c.

The *answer* of the defendant to the original bill admitted, that for several years prior to the 26th *October*, 1811, the plaintiff was a merchant, and owned ships, &c., and had occasion for large sums of money at different times; and that he applied to the defendant, and obtained an exchange of notes, to a large amount, between *January*, 1806, and *September*, 1808. That by an adjustment of accounts, on the 15th *September*, 1808, the advances of the plaintiff in notes exceeded the sales of goods of the plaintiff, the sum of 35,836 dollars and 43 cents; that upon that adjustment, the plaintiff gave to the defendant a note for 881 dollars and 84 cents, payable in nine months; and a memorandum was then made, stating that the note was given for the balance of a commission of two and a half per cent. on 35,836 dollars and 43 cents: and that a commission of two and a half per cent on sales by the defendant of the plaintiff's goods within the nine months, should be credited on that note; but if no sales within that time, the commission ac-

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count was to be considered as definitively adjusted. The defendant admitted that the plaintiff agreed to allow him two and a half per cent. commission on the amount of his notes advanced for the plaintiff; and for which he was to sell goods at auction, if furnished by the plaintiff; and he denied that he charged the plaintiff more than one commission of two and a half per cent., whether he sold goods or not, which was for his trouble and risk in advancing notes. The defendant admitted the agreement of the 26th of *October*, 1811; and alleged that the notes therein mentioned were all advanced subsequently to the 15th of *September*, 1808, and a receipt or memorandum was always given, expressing the conditions upon which they were advanced; all which receipts were of the following tenor: "Received, *New-York*, *May* 30, 1809, of *David Dunham*, his note for 1,325 dollars and 72 cents, ninety days, from 29th *May*, for my note, for same amount, subject to the same charges as per settlement of our former account." The defendant admitted that in the spring and summer of 1812, the plaintiff applied to him for large advances in notes, which were made as stated by the plaintiff, but they were all made under the agreement of *October* 26th, 1811. That in 1812, the ships *Bourdeaux* and *Tea Plant* arrived, and the defendant suffered the plaintiff to select, for auction, such parts of the cargoes as he thought proper; and suffered all the silks on board the ships to be sold by the plaintiff at private sale. That some part of the cargo of the *Tea Plant* being under some claim, could not be delivered to the defendant, who thereupon endorsed notes of the plaintiff's for 15,833 dollars and 34 cents, for which *Fanning & Co.* gave endorsed notes, as collateral security, and agreed to allow the defendant two and a half per cent. for commissions. He denied that any commission or premium was charged by him beyond the ordinary sales at auction, though such additional commission of two and a half per cent. on notes advanced, beside the commission of two and a half per cent. on sales at auction, was not illegal. He

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admitted that the notes given by the plaintiff were always payable one day sooner than the defendant's notes, but the notes endorsed by the defendant were one day later. That on the 9th of *March*, 1812, the defendant gave the plaintiff two notes for 3000 dollars each, and the plaintiff assigned to him, as collateral security, the one hundred shares in the manufactory at *W.*, and gave his notes for the same amount, subject to a commission of two and a half per cent., and sales to be effected or commissions collected from his part of the cargo of the *Tea Plant*; and that if no sales were effected, so as to cover the commissions, the defendant was to be at liberty to sell the manufacturing shares; and, in all cases, the commission of two and a half per cent. was to be secured. He admitted the bond and warrant of attorney of the 27th of *April*, 1812, the bond of the 12th of *May*, 1812, and the mortgage and the declaration of trust of 27th of *August*, 1812; but denied that the declaration of trust was intended as a substitute for the agreement of 26th of *October*, 1811, or that it cancelled it. He admitted the several notes stated in schedule A., for which a receipt was given; and he stated a renewal of three notes on the 27th of *August*, 1812, for 3050 dollars and 53 cents each; at which time the plaintiff gave the defendant another note, endorsed by *W. C.* or *S. C. & Son*, for 229 dollars and 27 cents, payble at four and a half months, taken as a settlement of commissions of two and a half per cent. on the renewal of the three last mentioned notes being given, five or six days after an adjustment between the parties, and on account of the declaration of trust. He admitted, that the declaration of trust of 27th of *August*, 1812, was intended as a final settlement, except that the plaintiff had a right to discharge the commission or premium notes, by furnishing goods to be sold at auction, and that the defendant was bound to sell free of commissions, until the amount sold equalled the amount of commissions, at two and a half per cent. on the

gross amount advanced by the defendant for the plaintiff. That in *July* or *August*, 1812, the plaintiff being in great want of money, applied to the defendant for his notes, which the defendant gave, as stated in the bill, for which the plaintiff gave his notes for the like amount, payable one day earlier, being nine in number; and that in *August*, 1812, five notes were exchanged. That all these notes were advanced by the defendant upon the customary mercantile usage, and upon the same terms as all the other notes. That on the 27th of *August*, 1812, the adjustment made between the parties was executed, and the defendant received the six notes of the plaintiff, for 1,149 dollars and 70 cents, each, mentioned in schedule A, for commissions claimed by the defendant, according to their several agreements. That the sum at which the last commissions were made up, were exclusive of the property previously sold for the plaintiff, at auction; but if the defendant had sold at auction, the property which the plaintiff sold at private sale, and the property retained by the plaintiff, the auction commissions would have exceeded the amount of the six notes. He admitted that the usual auction commissions would fall short of the commissions charged to the plaintiff, or 6,898 dollars; but that these commissions did not exceed the amount of such sales at auction, after deducting customary commissions, charges, and expenses. He admitted the entering up of the judgment, on the 19th of *December*, 1812, before the notes were due, the execution, &c. the feigned issue, and proceedings under the mortgage, &c. He admitted that he sold one third of the ship *Tea Plant* to *John Graham*, the purchaser at auction, for 6,575 dollars, on his own account, and that he entered forcibly, to give *J. G.* possession. He admitted the proceedings stated in the supplemental bill, relative to the feigned issue in the Supreme Court; but he said the Court denied the motion for a new trial, because they were of opinion that it was not a case in which they ought to have directed an issue; and

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for the same reason they discharged the order for an issue, &c.

December 1, 1820.—The cause was this day brought to a hearing on the pleadings and proofs.

Riggs and *Wells*, for the plaintiff. They contended,

1. That the facts set forth in the answer of the defendant clearly showed that the notes, mentioned in the writing of the 27th of *August*, 1812, were usurious and void.

2. That the collateral securities taken and held by the defendant, were also void.

3. That if there were any doubt as to the usurious character of the transactions between the parties, the verdict of the jury on the feigned issue, directed by the Supreme Court, was conclusive.

4. That the agreement between the parties of the 7th of *May*, 1816, precluded the defendant from drawing in question the fact of usury; especially as the defendant had obtained advantages by that agreement, amounting to a sufficient consideration in equity, to make it binding on him, and to estop him from denying the usury in the notes, and the consequent invalidity of the securities.

5. That when the fact of usury is admitted by the defendant's answer, or is proved against him by the plaintiff, the securities given for such usurious consideration are equally void in this Court as in a Court of law: and the defendant has stated facts in his answer, from which usury results, as a legal consequence.

6. That all, or most of the notes, mentioned in the schedule A, are payable at such times, that the legal interest for that period is less than the two and a half per cent. which is charged on the amount; and that is usury, in itself, and was so decided in this Court, and in the Supreme Court, and Court of Errors, in a similar case. (*Dunham* v. *Day*,

13 *Johns. Rep.* 40. *Dunham* v. *Gould*, 16 *Johns. Rep.* 367. *Dey* v. *Dunham*, 2 *Johns. Ch. Rep.* 182. 193.)

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7. That the sale of the plaintiff's interest in the ship *Tea Plant*, pending the proceedings in the Supreme Court, without judicial proceeding, or notice to the plaintiff to redeem, was unlawful; and rendered the defendant accountable for the proceeds, or for the value of the property.

8. That the manufacturing shares having perished in the hands of the defendant, according to his own showing, when held by an illegal title, he ought to account for their value.

T. A. Emmet, for the defendant. He contended, 1. That the commissions taken by the defendant, on the exchange of notes, were not usurious, and that the notes and other securities were legal and valid.

2. That independent of the commissions, the plaintiff was indebted to the defendant.

3. That the agreement of the 7th of *May*, 1816, had no relation to this cause, and nothing done under it could affect the rights of the defendant.

4. That the Supreme Court, having discharged the order for the feigned issue, and vacated all the proceedings under it, it became impossible for the defendant to prosecute the writ of error, as contemplated by the agreement of the 7th of *May*, 1816.

5. That the Supreme Court, having allowed the judgment obtained by the defendant against the plaintiff to stand, and given leave to issue an execution thereon, its validity was *res judicata*, and could not be questioned here.

6. But even if the transaction were usurious, the plaintiff's bill would be bad on demurrer, and cannot, on the hearing, entitle him to relief, unless he offers and consents to pay the principal and interest really and legally due.

February 10, 1821. The cause stood over for consideration, until this day.

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THE CHANCELLOR. 1. The first and great point in this case is, whether the charge of a commission of two and a half per cent. uniformly made by the defendant, upon the advance or endorsement of negotiable notes to and for the plaintiff, was usurious.

Where *D.* lent *F.* his promissory notes, and received the notes of *F.* for the same amount, in exchange, and also a commission of 2 and a half per cent. which exceeded the legal interest for the time the notes had to run, the transaction was held to be *usurious*, and the notes void.

The defendant was in the habit of loaning his promissory notes to the plaintiff, and of endorsing negotiable notes for the use and benefit of the plaintiff, from the 1st of *September*, 1808, down to the time that the plaintiff stopped payment, and of taking in return the plaintiff's notes for the same sum, payable within a day of the same periods of time. Instead of being a cash advance, it was a loan of his credit to the plaintiff, and attended with the same risk and trouble, as if he had loaned the cash. The notes answered the purpose of cash to the plaintiff, and considering them as cash, the defendant was entitled to ask and receive interest, in the name of commissions, at the rate of two and a half per cent. or at any rate that did not exceed the rate of seven per cent. per annum. But in every case in which a note was for four months, for instance, two and a half per cent. commissions was more than at the rate of seven per cent., and consequently usurious; and if for five months, for instance, it was less than the legal rate of interest, and consequently lawful. All the notes remaining unpaid which are specified in the schedule A. annexed to the writing of the date of the 27th of *August*, 1812, and in the pleadings set forth, were infected with usury, because the commission of two and a half per cent. allowed upon each of those notes exceeded the rate of lawful interest thereon. One of the three notes of the date of the 20th and 21st of *August*, 1812, and remaining unpaid, was for five months, but those three notes taken together, with the allowance of the commission of two and a half per cent. on the aggregate sum, exceeded the rate of lawful interest; and they ought to be taken together, as forming one distinct and entire transaction. The

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three notes of the date of the 30th of *March*, remaining unpaid were each for five months; but it appears in proof that they were not given until the 25th of *April*, though antedated, and a commission of two and a half per cent. upon those notes for the period they were to run, computing from the time they were actually given, exceeded also, the rate of lawful interest. And the five notes in that schedule, given for commissions, were given for comissions containing an unlawful excess of interest. The same objection to the legality of the commissions, will apply to many of the previous transactions of a similar nature detailed in the case, and there can be no doubt that continued usurious exactions, under cover of commissions, at the rate of two and a half per cent. were practised by the defendant upon the plaintiff, from the commencement of their dealing in the exchange of notes.

The defendant has set up, and urged, as a justification for the commissions charged, that they were the usual commissions of merchants and auctioneers, upon the sale of goods, and that those notes were loaned or endorsed on account of expected and promised deposits of goods to be made by the plaintiff, and sold on his account by the defendant. The advances and charges were made, as it is alleged, in anticipation of such deposits, and to ensure to the defendant the advantage of that preference. But the whole history of the case, and all the documents in proof, speak a different language. These assumed deposits were a mere pretext and cover for the charge of these unlawful and usurious commissions. I am perfectly satisfied that the exchange of notes was not made, or these commissions charged upon actual deposits of goods for sale, nor upon the credit of goods *bona fide* expected and intended to be deposited. It was a mere exchange of notes for the purpose of raising money by the one party, and for the purpose of exacting a premium of two and a half per cent. for the loan of his paper, by the other. The endorsement of notes, and

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the renewal of notes, were all for the same object; and the plaintiff was led on, step by step, into a labyrinth from which he could not extricate himself, and all the profits of his *India* trade, and tangible property at home, were drawn within the grasp of these persevering and usurious exactions. The defendant charged two and a half per cent. premium for every responsibility he assumed, in whatever shape it might be; and when we consider that the same charge was upon every renewal of notes, and that no goods were, in fact, sold by the defendant, and that during the year 1812, the idea of advances on expected deposits and sales grew more and more improbable and visionary, the whole pretence that the commission had a reference to future deposits and auction sales, is destitute of colour or plausibility. It is impossible to mistake the real nature of the transactions; the accumulated pledges of the judgment bond, mortgage, ships, and manufacturing shares, were all taken by the defendant as collateral securities for his paper and his commissions.

2. The next, and the more embarrassing point, is as to the nature and extent of the relief.

If the defendant was endeavouring to enforce any of his securities in this Court, and the present plaintiff had set up and made out the usury, by way of defence, the remedy would have been obvious. The securities would have been declared void, and ordered to be delivered up and cancelled. But the defendant has not resorted to this Court. He has caused a judgment to be entered up at law, upon the warrant of attorney given by the plaintiff; and the Supreme Court have ultimately refused to afford any relief to the plaintiff against that judgment, though that Court awarded a feigned issue, and had the usury in the bond upon which the judgment was entered, established by the verdict of a jury. The defendant has also proceeded to foreclose the mortgage, not by the aid of this Court, but

If the lender of money on an usurious contract seeks to enforce any of his securities, and the borrower sets up the defence of usury which is proved, the securities will be declared void, and be ordered to be delivered up and cancelled.

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by advertising under a power contained in the mortgage; and it is the present plaintiff who is compelled to come here and ask for relief, which he cannot obtain elsewhere, against the judgment at law and other legal securities infected with usury, by means of the original transactions and responsibilities which they were intended to cover.

The question now is, upon what terms he can have relief?

But where the lender has proceeded at law, and recovered judgment on a bond and warrant of attorney, or is proceeding to foreclose a mortgage by virtue of a power of sale, under the statute, and the borrower files his bill for relief against the judgment at law and other legal securities, on the ground of usury, he must, before he can be entitled to relief, pay, or offer to pay, the principal and interest lawfully due; and that, whether usury be established by proof or be admitted by the answer.

The feigned issue, which was awarded by the Supreme Court, upon the judgment in this case, was granted while I had the honour to preside in that Court; and that course was then understood to be the practice of the Court, when a judgment entered by confession was alleged to be affected with usury. And I should have supposed, that if the usury had been found by the jury, (as it was in that case, and upon the evidence now before me,) that the Court would have administered the same equitable relief that is usually granted here, or else have vacated the warrant of attorney, and set aside the judgment, and allowed the party to come in and plead the usury. But from the subsequent proceedings, I am led to infer, that the practice on this subject has been changed since I left that Court, and that all summary interference at law, with judgments upon confession, charged with usury, is now denied.

History of the practice of Courts of law, in interfering to set aside judgments by confession on bonds and warrants of attorney, on the ground of usury.

The history of the practice of the Courts of law, shows the embarrassments attending the subject, and the difficulty of applying a legal remedy, consistently with the rules of law.

In *Middleton* v. *Hill*, (*Cro. Eliz.* 568.) usury was pleaded to a *scire facias*, upon a judgment by confession. The K. B. held the plea bad, for that a judgment was not an *assurance* within the statute, and the defendant should not have suffered a judgment. "And though it may be a practice (*i. e.* bonds with warrants of attorney to confess judgment,) to avoid the statute, yet it shall rather be tolerated, than to avoid judgments upon such suggestions." The case of

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Rowe v. *Bellaseys*, (1 *Sid.* 182.) was to the same effect, and decided upon the same authority.

The same point was brought up again in the K. B., in *Bush, assignee of Jones*, v. *Gower*, (*Cases Temp. Hardw.* 220. *Str.* 1043.) when Lord *Hardwicke* presided, and received the same decision. But though the usury could not be reached by a plea to a *scire facias*, upon a judgment confessed, the Court hinted, "that it might be got at, on motion to vacate the judgment." Lord *Hardwicke* discovered great opposition to this mode of shutting out the defence of usury, and observed, that "it opened a door to an evasion of the statutes of usury, and, therefore, as far as the Court could, they would come at it" But he said, it could not be done by plea "in that method," for a judgment was not embraced by the words "contracts or assurances;" and he thought it strange, that no words had been ever inserted in any of the statutes against usury, to meet the practice of taking judgment bonds, which had been a contrivance used as early as Queen *Elizabeth's* time. He then threw out a suggestion for consideration, that "judgments of this sort might be set aside in an interlocutory way, as on a motion for ill practice, for the warrant of attorney might be considered as a contract within the statute, and upon this foot might be set aside."

This case was decided in 1736, and it contains probably the earliest hint at the equitable interference, upon motion and feigned issue, which has since, though in a manner unsteady, and fluctuating, prevailed in Courts of law.

In *Machin* v. *Delaval*, in the C. B., (*Barnes' Notes*, 52. 277. *S. C.*) we have, perhaps, the first precedent of this interference. A motion was made to set aside a judgment, entered upon warrant of attorney, and a feigned issue was awarded to try the fact of usury. At a subsequent term, after the trial of the feigned issue, and a verdict finding that the warrant of attorney to enter up the judgment had been given in consequence of an usurious contract, the Court set

aside the judgment, and directed the warrant of attorney, and *the bond on which the judgment was entered, to be delivered up*, and the plaintiff to pay the costs of the application. This decision carried the remedy, at once, to the utmost length, and further than it has been since carried. For, as Lord *Loughborough* observed, in *The Duke of Bolton* v. *Williams*, (2 *Vesey, jun.* 154.) Courts of law will, upon their general jurisdiction, enter into the validity of a warrant of attorney and judgment, and may vacate the warrant of attorney, and set aside the judgment; but the jurisdiction does not extend to ordering the bond to be delivered up, and if ever done, it has been done inadvertently.

The next case of this kind, arose in the K. B., in *Cook* v. *Jones*, (*Cowp.* 727.) A rule was granted, on the motion of the defendant, to show cause why a judgment entered on warrant of attorney, should not be set aside, on the ground that the consideration of the warrant was usurious. Lord *Mansfield* said, that the party was without relief, unless the Court interposed, and an issue was directed, to try whether the contract, upon which the warrant was given, was usurious.

We have no further report of the case, and are, therefore, unfortunately, without the means of knowing what kind of relief, and to what extent, the K. B. would have granted it, if the issue had been found in favour of the defendant.

In *Matthews* v. *Lewis*, (1 *Anst.* 7.) a motion was made on the common law side of the Court of Exchequer, to show cause why a judgment entered by confession should not be set aside for usury, and even the rule to show cause was denied. The Court admitted, that the K. B. had granted such motions, but that no such practice existed in that Court; and they observed, that to set aside judgments of that kind by a summary jurisdiction of a Court of law, was to usurp the office of a Court of Equity. The introduction of the practice of a feigned issue was rendered necessary by the first innovation

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of sustaining the motion. The Court intimated that the relief ought, in such cases, to be limited to the extent to which a Court of Equity goes, which decrees what is really due, and no more; and that if they set aside the judgment, the plaintiff would lose what was really advanced.

This case, as far as the authority of it reaches, shuts out completely, all relief at law after a judgment has been confessed. But we have two subsequent cases upon this subject in the C. B. in which it appears, that they continue to exercise an equitable jurisdiction, in cases of usury, over judgments by confession.

The first of these cases is that of *Edmonson* v. *Popkin*, (1 *B. & Puller*, 270.) in which a motion was made, founded on the preceding decision in *Barnes*, to set aside a warrant of attorney, and the judgment entered thereon, as having been made to secure an usurious loan. The Court did set aside the warrant of attorney and judgment, in order that the question of usury might be tried, which would be shut out, if the judgment was allowed to stand.

This decision was six years after that in the Exchequer; and it shows, that the Exchequer practice on the subject, was considered as peculiar to that Court, and had no influence upon the settled practice of the C. B.

The other case in the *C. B.* was that of *Hindle* v. *O Brien;* (1 *Taunton*, 413.) upon a like motion the usury was not denied; and the Court therefore said, that there was no ground for an issue; and they proceeded to grant relief, but not to the extent of the case in *Barnes*, nor of that in *B. & Puller*, for the last case seemed to enable the party to plead the usury, and thereby annul the bond entirely. They granted a limited relief, upon the principles of a Court of Equity, by compelling the defendant to do what was equitable, by paying the sum really advanced, with legal interest. It was considered as an application to the equitable jurisdiction of the

Court; and they ordered the money levied on execution to be brought into Court, and referred it to the prothonotary, to take an account generally, of all matters between the parties, and compute the principal and legal interest due to the plaintiff. The case says, the Court also set aside the judgment, but for what purpose does not appear.

We have here a series of decisions, showing, that the Court of C. B. does interfere, to set aside or control judgments by confession, infected with usury; and we have a decision of the K. B. to the same effect, founded on previous suggestions of that Court in favour of such a jurisdiction. The Court of Exchequer is the only Court of common law powers, which has, by a single decision, peremptorily refused to interfere; and, perhaps, that may have arisen from the circumstance, that the same Court has also a distinct equity jurisdiction.

The Supreme Court of this state has, until lately, followed the decisions of the K. B. and C. B. at *Westminster*.

In *Wardell* v. *Eden*, (2 *Johns. Cases*, 258.) the Court said, that the proper way to try the question of usury against a judgment entered by confession was, by awarding a feigned issue; and this was accordingly done, in the cases of *Gilbert* v. *Eden*, (2 *Johns. Cases*, 280.) and of *Slate* v. *Schuyler*. (3 *Johns. Rep.* 139.) In *Hewitt* v. *Fitch*, (3 *Johns. Rep.* 250.) the judgment was set aside, without a feigned issue, as there was no denial of the usury, nor any doubt of the fact.

But it now appears, from the proofs in this case, that after the feigned issue had been awarded and tried, and the usury found, the Supreme Court vacated all these proceedings, and denied all relief to the present plaintiff. The counsel for the defendant have insisted, that the order of the Supreme Court, vacating all the proceedings under the feigned issue, and allowing the defendant to proceed to execution upon his judgment, was to be received here, as a conclusive bar to the charge of usury made and proved in this case: I cannot consider the order in that light. Though

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I have not the benefit of the reasons on which the order of the Supreme Court was founded, I cannot possibly suppose, that they acted upon the assumption, that there was no usury in the case, especially after the verdict of the jury finding usury, and which verdict does not appear to have been set aside or questioned. I should rather infer, that the Court were pressed with the difficulty of applying a fit and suitable relief, considering how unstable the *English* decisions had been, as to the nature and extent of that relief; and that they thought it most advisable to follow the doctrine of the Court of Exchequer, and to leave the party to his suit in this Court, and which, in this instance, embraced not the judgment only, but all the claims and securities held by the defendant. I presume the Court acted upon sufficient considerations, but without any intention of deciding or concluding the question of usury, or affecting the title of the plaintiff to relief in equity.

With respect to the relief that can be afforded here, I take the rule to be, that a plaintiff who comes to a Court of Equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved, except upon the reasonable terms of paying to the defendant what is really and *bona fide* due to him. On the other hand, if the party claiming under such usurious judgment, or other security, resorts to this Court to render his claim available, and the defendant sets up and establishes the charge of usury, the Court will decide according to the letter of the statute, and deny all assistance, and set aside every security and instrument whatsoever, infected with usury. It is perfectly immaterial, in respect to the application of the principle to the case of the debtor who sues here, whether the usury be confessed by the defendant in his answer, or be made out by proof. The plaintiff must still consent to do what is just and equitable on his part, or the Court will not assist him, but leave him to make his

defence at law, as well as he can. The case of *Taylor* v. *Bell*, (2 *Vern.* 171.) is a striking, but very harsh illustration of the rule. The plaintiff had given bonds with sureties, for moneys borrowed at usury, and a warrant to confess judgment, and judgment was entered thereon. He then brought his bill to be relieved, and for an account, and though the answer confessed the facts from which the usury was deduced, relief was denied, and he was ordered to pay principal, interest, and costs. So, in a late case in the Exchequer, (*Skyrne* v. *Rybot*, cited in *Orde on Usury*, 113.) where a bond and warrant of attorney was taken in an usurious transaction, the decree was, to take an account of the money really paid, and that on payment thereof, the bond and warrant of attorney were to be delivered up. In *Scott* v. *Nesbit*, (2 *Bro.* 641. 2 *Cox*, 183.) we have this strong observation of Lord *Thurlow*: "I take it to be an universal rule," he observes, "that if it be necessary for you to come into this Court to displace a judgment at law, you must do it upon the equitable terms of paying the principal money really due, with lawful interest. I have no idea of displacing a judgment upon any other terms." He directed, in that case, that the judgment should stand as a security for the money actually paid, with legal interest.

The equity cases speak one uniform language; and I do not know of a case in which relief has ever been afforded to a plaintiff, seeking relief against usury, by bill, upon any other terms. It is the fundamental doctrine of the Court. Lord *Hardwicke* (1 *Vesey*, 320.) said, that in case of usury, equity suffers the party to the illicit contract to have relief, but whoever brings a bill, in case of usury, must submit to pay principal and interest due. Lord *Eldon*, (3 *Ves. & Bea.* 14.) after an interval of more than sixty years, declared precisely the same rule. At law, says he, you must make out the charge of usury, and at equity, you cannot

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come for relief, without offering to pay what is really due; and you must either prove the usury by legal evidence, or have the confession of the party. In *Eagleson* v. *Shotwell*, (1 *Johns. Ch. Rep.* 536.) the same rule was followed in this Court, where a party came to be relieved against usury in a mortgage.

I have been thus particular in showing the rule of equity on this subject, because the plaintiff has sought by his bill to have all the securities taken by the defendant, and infected with usury, declared void, and ordered to be cancelled, without offering to pay any thing. His counsel have also contended, at the hearing, that the rule in equity, where the defendant either confesses the usury, or it is established by testimony, is the same as it is when usury is set up as a defence to a demand in law or equity. All that I can do in this case, consistently with my view of the established doctrine of the Court, is, to direct an account to be taken of the dealings between the parties, and to hold the securities which the defendant has taken, to be good only for the balance which may appear to be due to the defendant, after deducting all usurious excess in any of his commissions and charges.

The objection that presses upon the subject is, that the statute of usury may be, in a great degree, eluded, by taking a judgment bond, which precludes the debtor from an opportunity of pleading the usury in a Court of law; and if he can only be relieved upon the principles of a Court of Equity, or by the summary powers of a Court of law, acting upon equitable principles, the usurious creditor is sure to preserve his principal sum, and the lawful interest. But this objection was for a long time perceived, and felt, and endured in the Courts of law, before any remedy could be applied; and though they interfered, at first, most effectually, by vacating the warrant of attorney, and allowing the party to come in and plead, they seem now to have abandoned the case to equitable relief, and to choose to

administer no other. It is the folly of the party to have precluded himself from pleading, by confessing judgment. *Leges vigilantibus non dormientibus subveniunt.* At any rate, though it were even to be regretted, that Courts of law cannot place the debtor in a condition to be enabled to annul the contract altogether, under the sanction of the statute; yet certainly I should introduce a new principle into this Court, if I was now to undertake to displace a judgment at law, upon any other terms than those I have mentioned.

The same objection and difficulty occur in the case of a mortgage taken to secure an usurious loan, with a power to sell, annexed to it, by means of which the creditor forecloses his mortgage by an act *in pais*, without calling upon any Court to assist him. The debtor has no relief in that case, but by applying to this Court, and then he must comply with the terms of paying what was actually advanced. He deprives himself, in that case, by the power to sell, as he does in the other, by his warrant of attorney to confess judgment, of an opportunity to appear in the character of defendant and plead the usury. These are cases in which the party, by his own voluntary act, deprives himself of his ability to inflict upon the creditor the loss of his entire debt. Many other cases may be stated in which the same result will follow. The party is in the same situation, if instead of resisting the usurious claim, he pays it. He cannot then expect assistance to recover back more than the usurious excess. If the warrant of attorney, or the power to sell were procured by fraud, or surprise, or accident, that would form a distinct head of relief, and in no wise applicable to the case. And, perhaps, it is sufficient for the purposes of public justice, and public policy, that the law has enabled a debtor, in every case, in which he does not of his own accord deprive himself of the means, to plead the statute in discharge of his usurious contract, and of his ob-

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ligation to pay even what was received, and that in all cases he can, by paying the actual principal received, and the lawful interest, be relieved from the usurious exaction.

The following decree was entered: "It is declared that the promissory notes given by the plaintiff to the defendant, and specified in the writing in the pleadings mentioned, of the 27th of *August*, 1812, and in schedule A. to the said writing annexed, and which remain unpaid, are infected with usury, and that the practice stated in the pleadings of asking and receiving a commission of two and a half per cent. upon the exchange of notes between the parties, or upon negotiable paper endorsed by the defendant, was usurious in every instance in which such commision exceeded the rate of seven dollars, for the forbearance of 100 dollars for one year, or exceeded that rule, for a greater or less sum, for any other period; and that the pretence set up by the defendant, that the said commissions were taken for and on account of expected deposits of goods for sale at auction, was unfounded in point of fact. And it is further declared to be the established doctrine and practice of the Court, that the plaintiff who seeks the aid of the Court to set aside a judgment at law, or other legal security, on the ground of usury, cannot be entitled to relief, whether the usury be established by proof, or admitted by the answer, except upon the terms of paying the principal and interest lawfully due thereon, after deducting every usurious excess; and that the judgment, and the mortgage, and the *West Chester* manufacturing stock, held by the defendant in this case, and mentioned in the pleadings, are to be deemed and taken as securities only for the balance that may be due, after such deduction. It is thereupon ordered, &c., that it be referred to one of the masters of the Court to take and state an account of all the loans or endorsements of notes, or advances in cash by the defendant, to or on behalf of the plaintiff, and of all notes given by the plain-

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tiff to him in exchange, or for commissions, or otherwise, and stated or referred to in the pleadings and proofs, from the commencement of their dealings as therein stated. and that on such accounting, the master in no case allow any commissions to the defendant beyond the lawful rate of interest declared as aforesaid; and that the defendant be charged with all excess of interest received by him, in the shape of commissions or otherwise, during the course of such dealings; and that he also credit the plaintiff with the amount for which his share or third part of the ship or vessel called the *Tea Plant*, sold for, as admitted in the pleadings, and with all other payments made by the plaintiff, and credited by the defendant, and that he report the balance, if any, remaining due to the defendant upon such accounting, and that interest be charged and allowed on such accounting, when the same would be proper, according to law, and the usage of the Court. And it is further ordered, that the master report to the Court with all convenient speed, and that the question of costs and all further directions be, in the mean time, reserved."

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VAN ALST and others *against* HUNTER and others.

A motion for a second trial of a feigned issue, directed by the Court, to try the validity of a will, made the second term after that in which the N. P. Record and Judge's certificate had been filed, and upon an *ex parte* statement of the evidence given at the trial, was denied, on the ground of the delay, and the want of the proper documents.

But a new trial may be moved for and granted at the final hearing, on the equity reserved.

Though it is the most usual course to award a second trial on a feigned issue, in cases touching the inheritance, where the verdict is in favour of the will, and against the heir at law, yet it rests entirely in the discretion of the Court to award a second trial or not, according to the circumstances and testimony in the case.

Nov. 9, 1820, and *Feb.* 13, 1821.

THE plaintiffs, *Abraham Van Alst* and twenty others, being heirs at law of *Jacob Bennet*, deceased, filed their bill on the 4th of *November*, 1818, against the defendants, *George Hunter*, and *Anne* his wife, and *David C. Van Alst*, to set aside the will of *Bennet*, on the ground of the incompetency of the testator.

The testator died on the 22d of *April*, 1817, leaving the plaintiffs, and the defendants *Anne Hunter* and *D. C. V. A.* his heirs at law. On the 10th of *January*, 1816, the testator made a will and codicil set forth in the bill, by which he gave to the defendant *Hunter*, and *Anne* his wife, the farm on which the testator then lived, at *Newtown*, in *Queen's* county, in fee, charged with the payment of 1,750 dollars, to the other defendant, *D. C. Van Alst*, the grandson of the testator. He also devised to them, his negroes, furniture, and stock on his farm, and directed his executors to pay his debts out of his personal estate not before bequeathed, and authorized them to sell his lands in *King's* county; and all the residue of his estate, of what nature or kind soever, he gave to his grand children and great grand children, in

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fee. *Anne Hunter* was the only surviving child of the testator. The bill charged that the defendants had taken possession of the real estate, and of the deeds and muniments of title, &c. That the said pretended will, if ever made and published, was void in law, on account of the incompetency of the testator, who was not of sound mind and memory, at the time, and was under the improper restraint and influence of the defendants. The bill *prayed*, that the will might be decreed to be void, and be ordered to be delivered up and cancelled; that a trial at law might be had, under the directions of the Court, to ascertain the validity or invalidity of the will and codicil; that the defendants be let into the possession of their respective shares of the premises; and that the defendants be enjoined from committing waste, and account for the rents and profits, &c., and for general relief.

The answer, filed *January* 29, 1819, admitted the descent of the plaintiffs, as stated, the seisin of *Bennet*, and his death, and that the defendants had possessed themselves of the real estate, &c.; and alleged that they had good title to the same, under the last will and testament of *J. B.*, dated *January* 10, 1816, duly attested; and they averred that the testator was of sound mind and memory when he made the will and codicil, &c., and that the same are valid at law, and were not made under any restraint or improper influence, and that they were willing that the validity of the will should be tried in any manner the Court might direct.

A replication was filed, and proof taken as to the competency of the testator. Twenty-one witnesses were examined on the part of the plaintiff, and twenty-three on the part of the defendants. On the 1st of *December*, 1819, a decretal order was made, directing a *feigned issue* to be made and tried in the city of *New-York*, by a jury, to determine whether *J. B.* was of sound mind and memory at the date of the will, and competent to make the will and codicil, on

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the trial of which issue the pleadings and the proofs taken in the cause were to be admitted in evidence. The feigned issue was tried at the *New-York* sittings, in *June*, 1820, before Mr. Justice *Yates*; and after a trial of eight days, the jury found a verdict for the defendants; and the judge *certified*, that the defendants examined twenty witnesses, whom he named, and read the deposisitions of seven witnesses who had been examined in chief in this Court, and that the plaintiffs had examined nineteen witnesses named by him, and read the depositions of five witnesses, who had been examined in chief in this Court; and that "the verdict was satisfactory to him." On the 26th of *June*, 1820, the N. P. Record of the feigned issue, with the judge's certificate endorsed thereon, were brought into this Court; and on motion of the counsel for the defendants, filed with the register. This Court continued its session, for four days, after the 26th of *June*; but no step was taken by the plaintiffs in the cause, nor were any proceedings had by them during the following *August* term. In the ensuing vacation, an order was obtained by the defendant's solicitor, to set down the cause for a final hearing in *October*, 1820, on the equity reserved. The cause was, accordingly, regularly brought to a hearing at that term, which commenced on the 23d of *October*.

November 9, 1820. *T. A. Emmet*, for the plaintiffs, moved for a new trial, on an *ex parte* statement of the evidence given at the trial of the feigned issue, furnished by him, and which accompanied the notice of the motion: and he also moved, that if it should be objected, that the evidence, so produced, was not duly authenticated, that a copy of the judge's minutes might be directed to be produced.

Wells, for the defendants, objected to the motion for a new trial, as being irregular, and too late. There had been,

he said, a delay of four days during *June* term, the whole of *August* term following, and of sixteen days during the *October* term, before the motion was made; and that no attempt had been made, on the part of the plaintiffs, during all that time, to have the case settled, nor had any application been made to the judge for a copy of his minutes. He cited 2 *Atk.* 378.

THE CHANCELLOR, for the reasons stated by the counsel for the defendants, denied the motion for a new trial.

The cause then came on for a final hearing on the equity reserved.

Wells, for the defendants, on the evidence taken in chief, the award of the feigned issue, and the judge's certificate, moved for a decree establishing the will of the testator, and that the plaintiffs pay the costs of the feigned issue.

T. A. Emmet and *Hoffman*, contra, contended, that in no instance had a second trial been refused, on an issue of *devisavit vel non*, where a verdict was found against the heirs; that the evidence taken in chief, which the counsel particularly examined and discussed, was very strong against the validity of the will; and that, at any rate, the Court would not affirm the verdict, without calling for the minutes of the judge as to the *parol* evidence given at the trial of the feigned issue. They cited 2 *Vesey*, 554. 2 *Vesey, jun.* 287. 4 *Vesey, jun.* 205. *Ambl.* 210. 2 *Vern.* 75. 378. *Dickens*, 500. 683. 7 *Br. P. C.* 149. 158. (2d ed.) 1 *Vesey*, 128. 3 *Atk.* 543. *Wyatt, P. R.* 263. 1 *Vern.* 293. 1 *Vesey*, 29. *Ambl.* 324. 3 *Atk.* 543. 2 *Vern.* 285. 1 *Phillimore*, 193, 194. 199, 200. 359. *Powell on Devises*, 146. 6 *Co. Rep.* 23.

D. B. Ogden and *Wells*, in reply, discussed the evidence

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taken in the cause, and stated the practice of the *English* Court of Chancery, as to granting new trials, in such cases. They cited *Wyatt*, 283. 1 *Vern.* 287. 1 *Vesey*, 28, 29. 3 *Atk.* 343. *Ambl.* 324. 2 *Vesey*, 558. 2 *Vesey, jun.* 287. 4 *Vesey*, 205. 2 *Vern.* 378. *Dickens*, 500. 683. 13 *Vesey*, 297. 4 *Bl. Comm.* 452. *Dickens*, 576. 9 *Vesey*, 165. 52. 5 *Wheat. Rep.* 424. 2 *Atk.* 321. 7 *Bro. P. C.* 177. 145.

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THE CHANCELLOR. This was a bill filed by the heirs of *Jacob Bennet*, to set aside his will, as having been made, when by reason of his age and infirmity, he was not of competent mind and memory, or of having been procured by the undue influence of the defendants. An issue was awarded, according to the practice of the Court in such cases, to try the question of the testator's competency, and the validity of the will. The cause was tried at the *New-York* Sittings, in *June*, 1820, and after a trial which lasted eight days, and in which thirty-nine witnesses were examined, *viva voce*, and twelve depositions of witnesses not produced, were read, the verdict of the jury was in favour of the validity of the will. The judge who presided at the trial, certified that the verdict was satisfactory to him, and no objection has been made to any proceeding or decision at the trial.

A motion for a second trial on a feigned issue, directed by this Court, to try the validity of a will, made the second term after the N. P. Record and certificate of the judge had been filed, on an *ex parte* statement of the evidence, was denied, on the ground of the delay, and the want of the proper documents.

The *nisi prius* record of the feigned issue and verdict, with the judge's certificate endorsed, was brought into this Court, and filed during the last *June* term, and four or five days before the end of the term. During the *August* term, nothing was moved or done in the case, but the cause was regularly set down for hearing, on the part of the defendants, at the last *October* term, upon the equity reserved. The term commenced on the 23d of *October*, and on the 9th of *November*, the counsel for the plaintiffs moved for a new trial upon an *ex parte* statement of the testimony taken upon the trial, and furnished on their part, but with-

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out any previous offer or attempt to settle a case between the parties, or any application or reference to the judge for his notes. The motion was consequently denied, by reason of the delay, and of the absence of every other document but the *ex parte* statement. The cause was then brought to a hearing upon the equity reserved, and a new trial was moved for, upon the ground of the testimony taken in chief in this Court, and which was substantially the same as that afterwards produced upon the trial of the feigned issue.

A new trial of a feigned issue may be granted, on a motion made for that purpose, at the final hearing, on the equity reserved.

There can be no doubt of the regularity of the application for a new trial, at the hearing upon the equity reserved. It has been as often granted in that way, as upon a previous petition, or distinct motion for the purpose. To satisfy myself upon the merits of the case, I have not only read over the testimony taken in chief, but have also applied to the learned judge who presided at the Sittings, and have examined his notes, taken at the trial, and compared the testimony of the witnesses who were sworn at the trial, with the testimony of the same witnesses previously taken in this Court. There were also some witnesses examined at the trial, who had not been previously examined here, and particularly five witnesses on the part of the defendants, who gave material testimony in addition to what had been before furnished, in favour of the testator's competency. I have thus possessed myself of all the proof taken on the subject, both in this Court and upon the trial of the issue, and there is no affidavit or suggestion of the discovery of further testimony material to the case.

The question then fairly presents itself: am I bound by the rules and practice of the Court, at all events, to grant a new trial, seeing that the verdict which has been taken, is against the heirs, and in favour of the will? Or, if a reasonable discretion is permitted to be exercised, is a new trial, under all the circumstances of this case, dictated by such discretion?

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1. There can be no doubt of its being the more usual course in the *English* Chancery to grant a second trial, in favour of the heir, and out of regard to the inheritance, which is greatly respected, and peculiarly guarded by the policy of the law. But I have not been able to discover any absolute and inflexible rule in favour of such second trial. Though the Court generally grants a second trial, in cases touching the inheritance, before it concludes the heir, yet this is not always the case, and there are precedents both ways. The latest case on the subject, is that of *White* v. *Wilson*, (13 *Vesey*, 87.) which came before Lord *Erskine*, in 1806. In that case, the devisees filed the bill, to have a will established and the trusts carried into execution. An issue, *devisavit vel non*, was granted at the instance of the heir at law, suggesting incompetency in the testator. Upon the trial of the issue in the K. B., a verdict was found in favour of the will. A motion was made on the part of the heir for a new trial, upon a suggestion of the expectation of further evidence; and that if directions were to be given upon this verdict, the effect would be a perpetual injunction, and the right never could be bound by a single ejectment. The Lord Chancellor declared, "That he should be very sorry to find a rule in the Court, that there must be a second trial of an issue, if desired, without any ground laid for it. The inclination of Courts of Justice is against permitting parties to beat up for evidence; especially in a case of fact, mixed with opinion. No affidavit is produced, giving the reason to expect further evidence capable of shaking the verdict." The new trial was accordingly denied; and when the cause was decided upon the equity reserved, the Chancellor gave no costs on either side, as to the trial of the issue, but ordered the heirs at law to pay the costs of the motion for a new trial, and gave them their costs of the suit.

Though it is the most usual course to grant a second trial on a feigned issue, in cases affecting the inheritance, where the verdict is in favour of the will, and against the heir, yet it rests entirely in the discretion of the Court, to award a second trial or not, according to the circumstances and testimony in the case.

This is a stronger case than if the heir had filed the bill; for here the heir was called into a Court of Equity, and did not voluntarily desert his privilege at law of trying the

question in ejectment, where a verdict does not conclude him. The heir has no right to come here, as of course, and have an issue substituted in the place of an ejectment; for a Court of Equity is not the proper jurisdiction to try the validity of a will. When an issue has been directed, on the bill of the heir at law, it has been, according to what was said by the Master of the Rolls, in *Jones* v. *Jones*, (3 *Merivale*, 161.) in cases, where no opposition has been made to that mode of proceeding. It has been understood to be settled, since the case of *Kerrich* v. *Bransby*, (3 *Bro. P. C.* 358.) decided on appeal, in 1727, that the validity of a will must be determined upon a trial at law. (See also 9 *Mod.* 90. *Dawson* v. *Chater.*) If the heir will abandon his remedy, by ejectment at law, and come here by bill, for an issue, (which has sometimes been termed an ejectment bill,) he must content himself to take his remedy here, under the doctrine of the Court, that a right may be considered as determined, with a view to a perpetual injunction, by one trial at law, *if such issue be sent out of this Court for that purpose.* This was the doctrine as declared by Lord *Thurlow*, in *Robinson* v. *Lord Byron;* (2 *Cox*, 4.) and it had formerly received illustration and sanction, on appeal, in parliament, in the case of *Lomax* v. *Ryder.* (2 *Bro. P. C.* 258.) In that case, an issue was awarded in Chancery, to try a question, as to what was freehold and what was copyhold land, and a new trial was afterwards moved for in Chancery, and denied. An appeal was carried to the House of Lords, and it was contended, that as the appellant's inheritance was concerned, it ought not to be bound by one trial, when he was at liberty to try his right in ejectment as often as he pleased.—That if he could not obtain a new trial, he would be for ever barred of his right, being restrained by the Court of Chancery from bringing any action at law to assert the same; and that by the rules and practice of the Court, in the case of an inheritance, a new trial was very rarely, if ever denied. To this it was answered, that the appellant had

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elected to take his remedy in equity, and not by ejectment. That the reason why, in ejectment, one trial does not bind the inheritance, is not from any rule or maxim of law, that one trial cannot conclude the right; for in proper actions that may be done, but from the peculiar nature of an ejectment, in which no judgment as to the inheritance, can be given.

The reasoning on the part of the respondent was sanctioned by the affirmance of the decree.

In the case of *Salter* v. *Hite*, (7 *Bro. P. C.* 208.) the devisees filed their bill, to establish a will; and the heir at law thereupon filed a cross bill, praying for an issue at law, to try the validity of the will. After the cause was at issue in chancery, several witnesses were examined on both sides, and an issue awarded. The trial of the issue at the assizes, lasted fourteen hours, and a great number of witnesses were examined, for and against the will, who spoke nearly to the same effect, as they had before deposed to, upon their examination in chancery. The verdict of the jury was in favour of the will; and in consequence of it, and of the great contrariety in the evidence, a new trial was moved for, and largely discussed; but Lord Chancellor *Bathurst*, in 1771, denied the motion, and declared, that both himself and the Judge who tried the cause, were satisfied with the verdict.

From this order, the heir at law appealed, and his very able counsel (Sir *J. Mansfield*, and Sergeant *Glynn*,) never pretended to claim, as a matter of right, that a second trial was to be granted, without having regard to the merits of the verdict. They only observed, "that Courts of Equity had often directed new trials in suspicious cases, where fraud or forgery was imputed to a will, and the verdict had not been satisfactory." They relied on the fact that the evidence clearly preponderated in favour of the heir, and that the evidence in support of the will was absurd, inconsistent, and contradictory, and, in short, that the facts given in evi-

dence were exceedingly complicated, and inconsistent with each other; and that on a new trial certain books which were material and wanting, might be produced. The order denying a new trial was reversed, and a new trial awarded; and on the second trial, which lasted eighteen hours, and in which the evidence was very contradictory and the circumstances complicated, the verdict was against the will, and another trial was then ordered by the Lord Chancellor. Upon this second order there was, also, an appeal, and this order was reversed, and the second verdict established. But it is to be observed, that the testimony on the second trial was very essentially varied, so as to render the verdict the result of different evidence; and it was declared upon the discussion on the last appeal before the Lords, that the Lords, in directing a new trial on the first appeal, acted upon the suspicions which they entertained as to the truth of the testimony in support of the will, and on the ground that the first verdict was not satisfactory upon the evidence.

This case may be cited as perfectly decisive of the question, and it proves, demonstrably, that there is no absolute and invariable rule of equity, that two successive verdicts are indispensable to establish a will. Such a rule would be most unreasonable and absurd. Lord *Bathurst*, in this case, refused a second trial; and when the Lords reversed the order, and granted a new trial, the counsel and the Court put it upon the ordinary and true ground for granting new trials, that the verdict was not satisfactory and was against the weight of evidence. The new trial was not the result of any arbitrary and fixed rule, for that would have precluded all discussion, but it proceeded from the application of a sound discretion to the special case. Lord *Hardwicke* has frequently declared, to the same effect, his sense of the rule for granting new trials, even where the inheritance was concerned. Thus he observed in *Stace* v. *Mabbot*, (2 *Vesey*, 553.) that the Court would direct a new trial, for further satisfaction in cases of feigned issues, if upon "any mate-

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rial and weighty reason," the verdict did not satisfy the Court; and that this was known to be the ordinary rule where a matter of inheritance was in question, "if any sort of objection arises to the trial." And he observed again, in *Cleeve* v. *Gascoigne* (*Amb.* 323.) that the Court "has frequently granted new trials, merely because the inheritance was to be bound." In *Baker* v. *Hart*, (1 *Vesey*, 28.) as reported in *Vesey*, Lord *Hardwicke* declared, that "in doubtful questions relating to inheritance, a Court of Equity frequently grants a new trial, without setting aside the former verdict, which is of great consequence to the parties, for then it may be given in evidence, though not conclusive." But, he further observed, that, "it had never prevailed as a general rule, though it was a matter of inheritance, *but according to the circumstances of the case.*" The most that can be said on the subject is, that the Court will more readily, and on slighter grounds, grant a new trial in favour of the heir, when the first verdict goes to establish the will, than in other cases where a feigned issue has been tried. The cases which have been, or which may be referred to on the question, prove this point, and they prove nothing more.

2. We are next led to look into the testimony in this case, and to determine whether, under all the circumstances, it be expedient and proper, that there should be a new trial.

Extreme old age does not, of itself, disqualify a person from making a will.

The testator was between 90 and 100 years of age, when he made his will, but it is well understood that age alone will not disqualify a person from making a will, provided he has a competent possession of his mental faculties. "A man may freely make his testament, how old soever he may be, for it is not the integrity of the body, but of the mind that is requisite in testaments." (*Swinb. part* 2. *sec.* 5.) This has been the doctrine of law in every age. *Senium quidem aetatis vel aegritudinem corporis sinceritatem mentis tenentium, testamenti factionem certum est non auferre.* (*Code*, 6. 22. 3.) *Sola, ac perse, senectus donationem testamentum aut*

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transactionem non vitiat. (*Code* 8. 54. 16. *note* 62.) The law looks only to the competency of the understanding; and neither age, nor sickness, nor extreme distress or debility of body will affect the capacity to make a will, if sufficient intelligence remains. *Voet*, in his Commentaries on the Pandects, (*Lib.* 28. *tit.* 1. *sec.* 36.) expresses himself on this point in the strongest and most emphatical language: *licet enim non sani tantum, sed et in agone mortis positi, seminece ac balbutiente lingua voluntatem promentes, recta testamenta condant, si modo, mente adhuc valeant.*

It is sufficient if the testator possesses a competent understanding.

Nor does the will, in the present case, upon its own intrinsic merits, betray a want of competent mental powers in the testator. He lived to witness three generations descended from his loins, and he had but one child left in the first degree, and this was his daughter, Mrs. *Hunter*, who undoubtedly felt the force of filial love and gratitude much more strongly and vividly than the remoter generations. The affections, and consequently the kindness and attention of the descendants naturally grow more languid as the generations recede from the common ancestor. It was she, who alone survived to nurse him with a daughter's care, and "to rock the cradle of reposing age." He had also been, for sixty years, a man of domestic and retired habits, and during all that time, almost wholly confined to his farm, on which he died, and which he had cultivated and guarded with care and attachment. Nothing was more natural and agreeable to the course of the affections, than that he should cherish a wish which he so often declared, to have that *homestead* (as it is termed in his will) preserved entire for his daughter, and not sold or parcelled out among twenty or thirty distant descendants. He, therefore, devised this homestead, with the stock upon it, to his daughter and her husband, and charged it with a legacy of 1700 dollars to a particular grandson who lived with him. The residue of his estate he distributed equally among a numerous progeny of grand and great grand children; and I should feel reluctant, without pretty strong

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proof of incapacity, to disturb a will replete with so much just feeling and rational calculation.

It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life, to command the attentions due to his infirmities. The will of such an aged man, ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation, and the course of the natural affections, dictated.

There is no ground whatever in this case for the imputation of fraud or unfair practices, in the procuring of this will. The manner in which this will was read over to the testator, and corrected, and executed, and the reputation of the person by whom it was drawn, and the character and knowledge of the subscribing witnesses, have satisfied me, that it was fairly executed. The whole case resolves itself into one simple question of fact, whether the testator, by reason of age, had, or had not, lost his sound disposing mind and memory?

It is worthy of observation, that not a single act of folly or imbecility is imputed by any of the witnesses to the testator. The witnesses, on one side, represent his memory as gone, and that he was always of weak understanding, and quite illiterate; and they then give their opinion, that he was not competent to make a will. The witnesses on the other side, represent him as a man of remarkable activity and memory for his age; and they give numerous instances of his vigilant and sharp attention to his property. I cannot perceive that a single foolish act or saying has been imputed to him. And all the proof of mental imbecility seems to have been inferred from his loss of memory, except it be, perhaps,

in the case of a conversation with a clergyman on the subject of religion. The weight of testimony, from the proofs taken in chief, appears to me to be decidedly in favour of the requisite competency of mind; and that preponderancy of testimony is increased by the facts detailed by the five new witnesses. who were examined at the trial on the part of the defendants. The failure of memory is not sufficient to create the incapacity, unless it be quite total, or extend to his immediate family and property. The Roman law (*Code* 6. 24. 14. *and note* 55.) seemed to apply the incapacity only to an extreme failure of memory, as for a man to forget his own name—*fatuus præsumitur qui in proprio nomine errat.* There was no defect of memory, in this case, in respect to any thing very essential; and the witnesses give many instances of a strong and correct memory in the testator. The want of recollection of names is one of the earliest symptoms of a decay of the memory; but this failure may exist to a very great degree, and yet "the solid power of understanding" remain.

There does not appear to me to be any just ground for a new trial. There is no new light to be thrown on the subject by further proof; and I am more satisfied with this verdict than I should have been, if it had been on the other side. If a second trial was to be had, and a verdict found the other way, it would seem almost to follow of course (assuming the fact that the verdict was found upon the same testimony) that a third trial must be awarded, in order to turn the scale. The property and the parties would probably be, by that time, nearly exhausted by such very expensive and distressing litigation; and I do not see that such a result would promote either the ends or the reputation of the administration of justice.

I shall, accordingly. deny the motion for a new trial, and shall hold the plaintiffs concluded by the verdict, from contesting at law, the title of the defendants under the will, and shall enjoin them perpetually from proceeding at law, to

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question that title. No costs are awarded to either party as against the other.

The following decree was entered:—

"It is declared, that there is not any rule in equity, requiring two verdicts upon one or more feigned issues in favour of the validity of a will, before this Court can establish the same as against the heirs at law; and that the awarding of a second trial after a verdict in favour of the will has been found upon a feigned issue directed out of this Court, rests entirely in discretion, to be governed by the circumstances and testimony appearing in the case. And it is further declared, that the verdict upon the feigned issue in this case does not appear to be against the weight of evidence, either in respect to the sound disposing mind and memory of the testator, at the time of the execution of the will, or the integrity with which the will was procured and executed. It is thereupon ordered, &c., that a perpetual injunction be awarded to stay any ejectment or other action at law of the plaintiffs, or either of them, and of all persons claiming under them against the defendants, or either of them, and all persons claiming under them, upon any claim or alleged title, as heirs at law of *Jacob Bennet*, deceased, against the claim and title of the defendants, under the will in the pleadings mentioned of the said *Jacob Bennet*. And it is further ordered, &c., that no costs of this suit be taxed by either party as against the other."

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HEDGES and wife *against* RIKER and others.

A devise to executors in trust for *C.*, for life, and if she died without issue, then in remainder over, with power to the executors "to sell and dispose of so much of the real estate, as should be necessary to fulfil the will," is sufficient to authorize the executors, (the persons in remainder being infants,) to execute leases for years, of the real estate, for such terms, and upon such conditions, as were reasonable and necessary to carry into effect the intentions of the testator, expressed in the will.

But without resorting to such a power, as necessarily implied by the words of the will, this Court, having a general jurisdiction over the property of infants, may authorize the executors to make such leases, with consent of the tenant for life, for the term of twenty-one years, or building leases, as they should deem most beneficial to the interest of the tenant for life, and those entitled to the reversion or remainder in fee.

MARY M'CREA, a widow, by her last will, dated *March* 8th, 1817, devised and bequeathed to her executors, therein named, in trust, for the sole benefit and use of her daughter *Catharine*, now the wife of the plaintiff *Hedges*, the whole income, rents, issues, and profits of all her estate, real and personal, whatsoever and wheresoever, subject to the payment of the legacies, and dispositions, in her said will afterwards mentioned. And she directed her executors to pay over to her said daughter, the whole of the said income, rents, issues, and profits of her estate, excepting so much as might be necessary to pay the annual taxes and other incidental charges, during her natural life, for her proper use and benefit, and that of her child or children, if any she should have; and after her death, to her child or children; if but one child, solely, if more than one, in equal proportions, in fee. And in case the said daughter of the testatrix should die without leaving issue, then the whole estate, subject as aforesaid, was to be divided by her said executors in- *February* 14.

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to twenty equal shares, in the manner directed by the will, one of which shares was devised in fee to her sister; and the other shares were in like manner to be distributed by the executors, according to the directions of the will. The defendants, *R. Riker*, *John Beekman*, and *William B. Crosby*, were appointed executors, and the testatrix gave them, and the survivors of them, full power "to sell and dispose of so much of her real estate, as might be necessary to fulfil her said last will and testament, and as might be necessary to pay any assessments or regulations which might be made respecting the said estate." The testatrix died *March* 22, 1817, and the defendants took upon themselves the execution of her will. Her daughter, *Catharine*, who is her only child, and about thirty-four years of age, soon after the death of her mother, married the plaintiff *H.*, and the plaintiffs have two infant children, of very tender age. Most of the persons named in the will, to take remainder, are infants. The bill stated, that a very considerable portion of the real estate so devised consisted of vacant lots of land in the city of *New-York*, which were wholly unproductive. That the plaintiffs are not in a situation to improve those lots in a proper and advantageous manner; and that advantageous leases of them cannot be made for the life of Mrs. *Hedges*, as few, if any, persons are willing to take leases for a term so precarious and uncertain; and that the plaintiffs, without the authority and consent of the executors, could not enter into covenants to pay for improvements, or any other special covenants. That great charges and expenses, arising from public taxes and from assessments for public streets, and improvements making near the premises, are continually accruing; and the plaintiffs have very slender means to pay the same, maintain themselves and family, and educate their children, except from the premises, whereby the intention of the testatrix towards her daughter, expressed in her will, will be defeated, unless the executors should consent, or be directed

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by this Court, to demise the said lots for a term of twenty-one years, or some other fit and proper term, so as to enable the lessees to make permanent improvements, and thereby induce them to pay an adequate and more advantageous rent. That the executors, though desirous of fulfilling the trusts reposed in them, do not conceive themselves authorised, and, therefore, decline to make any lease or leases of the premises, except for the life of Mrs. *H.*, unless under the direction and indemnity of this Court; alleging that the several persons named in remainder have contingent estates and interests, which may be affected by leases for a term of years, in case of the death of Mrs. *H.*, before the expiration of the terms of such leases. The bill *prayed*, that the executors might be decreed to make, with the consent of the plaintiffs, leases of the vacant lots, for the term of twenty-one years, reserving annual rents, upon condition that the lessees erect fit, convenient, and permanent buildings, and make lasting improvements on the lots, to be appraised and paid for at the expiration of the leases, by the persons who shall, at the time, be seized of the lots in fee, or that the leases be renewed and extended for a further term of twenty-one years, at their option, &c.

The defendants, being infants, answered by their guardians, and submitted their rights and interests to the protection and judgment of the Court. The executors admitted the facts stated in the bill, and submitted themselves to the direction of the Court.

T. A. Emmet, for the plaintiffs.

J. L. Riker, for the defendants.

THE CHANCELLOR. The will of *Mary M'Crea* bequeaths and devises to her executors in trust, for the use and benefit of her only child, the present plaintiff *Mrs. Hedges*, the

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whole income, rents, issues, and profits of her estate, real and personal, during her natural life, for her use and that of her children, and after her death to her children; and if she should die without issue, then the remainder over to be distributed according to the directions of the will. She then gives to her executors "full power and authority to sell and dispose of so much of the real estate as may be necessary to fulfil the will."

The bill states, that Mrs. *Hedges* has infant children living, and that a very considerable portion of the real estate consists of vacant lots in the city of *New-York*, which are wholly unproductive; that she and her husband are not in circumstances to improve the vacant lots in a fit and proper manner, and that advantageous leases of the lots cannot be made by executors, for so precarious and uncertain a term as her life; that great charges and expenses, arising from public taxes, and for assessments for public streets and improvements making near the said untenanted and unproductive lots, are continually accruing on account of said lots, which the plaintiffs have very slender means to pay, and to maintain themselves and their family; that the benevolent intentions of the testator will be defeated unless the executors are enabled to lease the same for the term of twenty-one years, or for some other fit and proper term of years, so as to enable the lessees to make proper and permanent improvements, yielding a reasonable rent. That the interest of the defendants is only a remote contingent remainder. The bill accordingly prays, that the executors may be enabled, with the consent of the plaintiffs, to lease the said vacant lots, for a term of years certain, not exceeding twenty-one years, reserving an annual rent, and that the lessees should be enabled to erect suitable buildings, and make other fit and convenient improvements, and upon agreement with the executors, that, at the expiration of the leases, the buildings to be erected thereon, should be valued by indifferent persons to be appointed by the Court, and the valuations

to be paid to the tenants or their assigns or lawful representatives, by the person or persons entitled to the life estate in the premises, or by the persons then seized of the same in fee, or that the leases shall be renewed and extended for the further term of twenty one years, at the option of the persons entitled to the life estate, or the estate in fee therein, as the case may admit.

The defendants, who are infants, by their answers submit themselves and their rights to the judgment and protection of the Court. The executors admit the facts charged in the bill, and state that the vacant lots are forty-one in number, and that unless they are authorised to make long leases with covenants to pay for improvements, the lots will be wholly unproductive, and they submit themselves, also, to the judgment and protection of the Court.

I am induced to think, that the words in the will giving to the executors power "to sell and dispose of so much of the real estate, as should be necessary to fulfil the will," will authorize them to dispose of the vacant lots, by lease, according to the prayer of the bill, inasmuch as such a disposition is requisite to carry into effect the intentions of the will. A devise to the wife for life, with power to *dispose* of the estate, to the children, was held in *Liefe* v. *Saltingstone*. (1 *Mod.* 189.) to give a power to sell in fee, if the necessities of the daughter and her children should require it; and the greater power includes the less, and will authorize, in a case of the like necessity, a more confined and limited exercise of the power. A lease for years is still a disposition of the estate, within the terms of the power; and without resorting to the power, the general jurisdiction of the Court, over the property of infants, is adequate to confer the authority. The Court stands, as Lord *Nottingham* observed, *in loco parentis*; and it is understood to be clearly settled, (3 *Johns. Ch. Rep.* 370.) that the Court may change the estate of infants from real into personal, and from personal into real, whenever it deems such a proceeding most beneficial

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to the infant. It was declared by the Lords Commissioners, in *Cecil* v. *Earl of Salisbury*, (2 *Vern.* 224.) that the Court had often decreed building leases, for sixty years, of infants' estates, when for their benefit.

I shall, accordingly, declare, that the interest of the plaintiffs and their issue, and the intentions of the will require, that the vacant lots in the pleadings mentioned should be leased in the manner mentioned in the bill; and that the lots could be thereby greatly and permanently increased in value, to the benefit not only of the plaintiff Mrs. *Hedges* and her children, but to the benefit of those defendants, who have a contingent remainder therein; and I shall order, that the executors and the survivors, and last survivor of them, whenever fit and proper opportunities shall offer, may, with the approbation and consent of the plaintiffs, cause the said vacant lots, and any, or all of them, to be leased for a term of years, not exceeding twenty-one years, reserving an annual rent, in and by such leases, and with permission contained therein, to allow the lessees to erect suitable buildings, and to make other fit and convenient improvements, as shall be agreed on, between them and the executors, and survivors, or survivor of them, and upon the further agreement, at the expiration of the leases, the buildings, to be erected thereon, shall be appraised by one or more persons, to be agreed upon by parties, then having the interest therein, or to be appointed under the direction of the Court, and the valuations paid to the tenants, or their lawful representatives, by the persons then entitled to the reversion, or upon such other terms, or conditions, as shall be agreed on, and deemed by the executors beneficial to the interest of the plaintiffs, and those entitled to the reversion, or remainder in fee. And further, that the costs of this suit be paid out of the trust estate aforesaid.

A difficulty has been suggested, as to infants who may be born after the decree, and how they are to be bound. To meet it, liberty may be reserved in the decree, if the parties

please, to file one or more supplemental bills, from time to time, as new parties may arise, or become interested, so as to enable the tenants to become parties, and to make any infants that may be hereafter born also parties, should the course of events render any such measures necessary. This liberty is granted without giving any opinion as to its necessity, or without expressing any intimation, that the leases granted under the authority of this decree, would not be valid against any subsequently born issue. 1821. WATSON v. HUNTER

Decree accordingly.

WATSON *against* HUNTER and M'CLAY.

This Court will not, unless under very special circumstances, grant an injunction, where *waste* has been committed by a tenant, to prevent timber which had been cut, from being removed.

In ordinary cases, the Court interfere only to prevent or stay *future* waste.

THE bill stated that the plaintiff had a deed in fee for the premises mentioned, under a declaration of trust, in favour of *Samuel S. Haight*, to be executed on payment of 1,666 dollars and 36 cents; to secure which payment, the fee of the land was vested in the plaintiff. That the defendants were in possession, under a lease for four years; that the principal value of the land, as a security, consisted in the pine timber growing thereon. That the defendants were committing great waste in the timber, and had already cut down large quantities of it, and were sawing it at their mills, for sale. That the premises were a slender security for the debt due to the plaintiff, charged thereon. *Prayer* for an injunction, restraining the defendants from cutting down any more timber, or from *removing that already cut down, and* *February 22.*

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not sawed, and that which was converted into boards or plank; and for general relief.

Ward, for the motion.

THE CHANCELLOR. Injunctions to the extent prayed for may have been granted; but as I am not satisfied as to the propriety of such extensive and summary interference, I have been led to look into the course of the *English* authorities and practice on the point. After timber is cut, it ceases to be part of the realty, and is converted into personal property, and *trover* will lie for it. The question is, whether this Court ought to interfere, in the first instance, to control the disposition of that personal property; and that, too, without any special or extraordinary necessity stated for such interference.

The practice of granting injunctions, in cases of waste, is to prevent or stay the *future* commission of waste; and the remedy for waste already committed, is merely *incidental* to the jurisdiction in the other case, assumed to prevent multiplicity of suits, and to save the party the necessity of resorting to *trover* at law. Thus, in the case of *Jesus College* v. *Bloom*, (3 *Atk.* 262. *Ambl.* 54.) a bill was filed for an account and satisfaction for waste in cutting down trees, and no injunction was prayed for, and the tenant's estate had been assigned and determined. Lord *Hardwicke* held, that the bill was improper, and would not lie merely for satisfaction for timber cut down, and that an action of *trover* was the remedy. Where the bill was for an injunction to prevent waste, and for waste already committed, the Court, to prevent a double suit, would award an injunction to prevent future waste, and decree an account and satisfaction for what was past. The ground for coming into Chancery, was to stay waste, and not for satisfaction for the damages, as the commission of waste was a tort, and the remedy lay at law. But to prevent multiplicity of suits, the Court, on

bills for injunctions to stay waste, and where waste had already been committed, would make a complete decree, and give the injured party a satisfaction for what had been done, and not put him to another action at law. The bill, in that case, was consequently dismissed. In the subsequent case of *Smith* v. *Cooke*, (3 *Atk.* 381.) Lord *Hardwicke* observed, that if the estate of the lessee was determined, and he had quit, a party could not come into equity, merely for an account of timber cut wrongfully; but where he continued in possession, and in a condition to commit more waste, the party might come into equity to stay future waste, and also be entitled to an account for the waste committed. So, again, in the case of *Lee* v. *Alston*. (1 *Vesey, jun.* 78.) the same doctrine was declared by Lord *Thurlow*. A bill was filed by a remainder man in fee, against a tenant for life, for an account of timber cut, and for an injunction. The answer admitted the cutting of the timber wrongfully, as charged, and an account was decreed. It was observed, that the plaintiff, on the discovery by the answer, might have resorted to *trover* at law, but he was not obliged to do so, and might have an account under the admission in the answer. The Chancellor referred to the case of *Whitfield* v. *Bewit*, (2 *P. Wms.* 240.) which was a bill for an injunction to stay waste, and for an account of timber cut, and in which it seemed to be held, that the right to the timber cut might be pursued in Chancery, as well as by *trover* at law.

The same doctrine was declared by Lord *Hardwicke*, in *Garth* v. *Cotton*, (1 *Vesey* 528.) and that the decree for an account of the waste already committed, was "an incident" to the injunction to stay waste. It would seem, then, to be a stretch of jurisdiction, to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. This would be enlarging the substituted remedy in this Court much beyond the remedy at law; and if it had been the established *English* practice, we should not

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have been without the most clear and explicit cases in proof of it. The recovery in this Court is not the timber itself, *in specie*, but damages for the value of it; and why should the personal chattel be bound by injunction in this case, more than in any other case, where the remedy is for a tort sounding in damages? This Court will stay the commission of waste, or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief; but the only mischief, that can arise in the present case, as to the timber already cut and drawn to the mills of the defendants, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief, which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste, already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of waste, in the Courts of common law.

In the case of the *Bishop of London* v. *Webb*, (1 *P. Wms.* 527.) an injunction was called for against a lessee for years, to prevent digging the ground for brick, as it was destroying the field and carrying away the soil. The Lord Chancellor said, "let the defendant carry off the brick he has dug, but be enjoined from further digging." In *Packington's Case*, (3 *Atk.* 213.) the bill stated, that the defendant had cut down a great number of trees, and had threatened to cut down and destroy them all, but the injunction only went to restrain him "from cutting down timber trees growing."

The only case I have met with, applicable to the very point, is a very loose note of an *anonymous* case of 1 *Vesey, jun.* 93. in which the solicitor general moved for an order to prevent the removal of timber wrongfully cut down. In what stage of the cause, or upon what state of pleadings and proofs, of this motion was made, does not appear. Lord *Thurlow* is said to have observed, "I have no doubt about the interference of this Court to prevent waste. The only

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difficulty I have, is, as to what shall be done with the timber cut. *Trover* might be brought for it; but, as the *Register* says many orders of this kind have been made, take the order."

Such a case is not a sufficient authority to extend the injunction to the timber already cut. There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under the shelter of it. Perhaps, in that and like cases, where the mischief would be irreparable, it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber. I do not mean to be understood to say, that the Court will never interfere, but that it ought not to be done in ordinary cases like the present. I shall accordingly confine the injunction to the timber standing or growing at the time of the service of the process.

Order accordingly.

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DALE v. ROOSEVELT.

DALE and wife, executors of FULTON, *against* N. I. ROOSEVELT.

Where F. was induced by the representations of R. that he had discovered a valuable *Coal Mine*, on the Bank of the *Ohio River*, to enter into, and contract for the purchase of a tract of land, stated by R. to embrace the mine; and besides paying to R. 4400 dollars, F. covenanted to pay him one thousand dollars annually, for twenty years; but which annuity was to cease, if after the mine was faithfully worked by R. it should not produce at least 12,000 chaldrons, &c., and the land was accordingly conveyed by R. to F. It appearing that there was, in fact, no coal mine within the boundaries of the land conveyed, though there was coal adjoining it, in the bed of the river, which was navigable, deep, and rapid; but the working of the mine, if practicable, would be very hazardous, expensive and unprofitable: the contract, on the part of F., was held to be founded in mistake and misrepresentation; and R. was perpetually enjoined from bringing any suit against F. to recover the annuity so agreed to be paid by him.

Feb. 23, 1821. THE plaintiffs, as executors of *Robert Fulton*, filed their bill, the 18th of *November*, 1817, for relief against an agreement entered into between the testator, in his life time, and the defendant. The agreement, which was under seal, was dated *September* 16th, 1813. It recited, that the defendant had discovered a *coal mine* on the *bank* of the river *Ohio*, in the *Indiana* Territory, some distance above *Anderson's* creek, at which mine the steam boat, on her first descent, took in coal for her fuel; that the coal mine was embraced by certain land, particularly described; which land, the defendant covenanted to convey, by letters patent from the *United States*, to *F.* in fee; and *F.* covenanted, on receiving the letters patent for the land, to pay to the defendant, 4400 dollars, &c.; and, also, to pay to the defendant, for the term of twenty years, from the 5th of *June*, 1814, one thousand dollars, yearly, in quarterly pay-

ments. That *F.* should, in a convenient time after the 5th of *June*, 1814, commence working on the mine; and should the mine become exhausted, after faithfully and scientifically working the same, within the boundaries of the lands so described, and not so much coal be found as to produce *twelve thousand* chaldrons; and should a question arise, within the *twenty* years, whether the land had been or could be made to produce that quantity, the matter should be decided by three persons, to be chosen in the mode provided in the agreement, and their decision should be final; and the payment of the one thousand dollars a year to the defendant should cease, if the decision should be that the quantity of 12,000 chaldrons had not been, or could not be produced; otherwise the annuity was to continue. The bill stated, that *F.* was induced to enter into this agreement solely from the representations of the defendant, which were false and deceptive. And that the defendant had brought a suit at law against the plaintiffs, as executors of *F.* on the agreement. The bill *prayed* for an injunction to stay the suit at law, and that the agreement might be decreed to be delivered up, to be cancelled; and for general relief.

The defendant appeared, and filed his answer, the 23d of of *January*, 1819; and a replication having been filed, several witnesses were examined by the parties. The evidence taken in the cause is fully stated in the opinion delivered by the Court.

Wells, for the plaintiffs.

D. B. Ogden, for the defendant.

THE CHANCELLOR. The representatives of *Robert Fulton*, deceased, are sued at law, upon a covenant which he made with the defendant, to pay him an annuity of 1,000 dollars a year, for twenty years, to be computed from the 5th

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of *June*, 1814. The consideration for this covenant was the conveyance of 1,040 acres of land on the right bank of the river *Ohio*, in the new state of *Indiana*, stated to embrace "a certain coal mine, on the bank of the *Ohio* river, in the *Indiana* territory, some distance above where the creek, called *Anderson's* creek, empties into the *Ohio* river," and which coal mine the defendant "did discover." These words are taken from the contract set forth in the bill, and under the hand and seal of both parties; and the great point in the case is, whether the contract was not founded upon representations made by the defendant to *Fulton*, which were not true in point of fact.

There can be no doubt, that the sole inducement, on the part of *Fulton*, in making the purchase, was to obtain the ownership of a mine of mineral coal. This is apparent from the contract itself, and from every document connected with it, and referred to in the pleadings.

The representations made by the defendant were in writing, and in answer to a letter of *Fulton*, and were made a few days before the execution of the contract, and those representations gave a very flattering account of the situation of the coal mine, of its productiveness, and of the facility with which it might be worked.

In that answer, the defendant stated "the quality of the coal to be *excellent*; that the *first stratum* had not been worked to the bottom; that when he first discovered the mine, after *removing a few inches of earth*, he did, with the aid of a hatchet and a few wooden wedges, break or split off *squares of coal* as large as two men could handle, and then threw in his boat *a few chaldrons*, procured in that way, and kept with it a constant fire all the way to *Natchez*. That when he arrived at *Natchez*, he sold what remained, say 30 or 40 bushels, for smiths' use. That on his second descent with the steam boat, he had, on arrival at the *coal bank*, no occasion to take any coal out of the mine, as he found, ready

raised, *within ten feet of where the steam boat came to, many thousands of bushels thrown up*, ready to be carried off by flats, some of which were then on the spot to load. That he took on board as much of the coal as he judged necessary; that during his residence at *New-Orleans*, he found *several flats loaded with coal for sale*, which came from the same mine; that the mine had been opened on, or near the centre of the line of the river; that the *coal, when the water is up, is overflowed*, as well as all the bottom land on the margin of the *Ohio*; that by wheeling it a *few yards* out of the mine, it may be put upon high ground, accessible at all stages of the water."

These representations are contradicted by two witnesses, who have been examined on the part of the plaintiffs, and who prove that the mine is not on the bank of the river, and is not productive, and is almost incapable of being worked.

James M'Daniel, jun. says, he knows the tract of land said to belong to the heirs of *Fulton*, and that he lives in *Perry* county, in the state of *Indiana*, and about five miles from the tract, and is a farmer of fifty years of age and upwards. That he is acquainted with the *Ohio* river, to the distance of forty miles above the mouth of *Anderson's* river, and that there is a coal mine four or five miles above the mouth of that river. That a bed of coal was discovered opposite the said tract of land, "in the bed of the river," and that coal has been raised from that bed, though he knows of no boats taking in coal there, except a small canoe, and he assisted in raising 8 or 10 bushels from that mine. That in some seasons, it is covered throughout the year with water, and is always covered, except in very low water. That the water of the *Ohio* rises from 35 to 40 feet, and the current is rapid, and the coal mine could not be worked, "but at a very great expense."

John Bristow says, he is upwards of thirty-three years of age, and is by occupation a carpenter, and resides at *Troy*, in *Perry* county aforesaid, and is acquainted with the tract

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of land said to have been sold by the defendant to *Fulton*. That he is acquainted with the *Ohio*, for thirty miles up, from the mouth of *Anderson's* river, and that there is a coal bed, "in the bed of the *Ohio*," four or five miles above the mouth of *Anderson's* creek. That it does not appear to be an extensive mine, and the place is covered with water, at least two-thirds of the year. That the water of the *Ohio* rises 30 feet and more, and the current is rapid, and the mine could not be worked, "but at very great expense." That the bed of coal is covered with slate rock, to the depth of six or seven feet. That he does not know of any steam boat, or other boat taking in coal at that place, except one keel boat, which was there loaded for sale. That he has assisted in raising coal from that mine.

The defendant examined three witnesses, in support of the truth and accuracy of his representations.

Thomas C. White says, he has been in the state of *Indiana*, upon the river *Ohio*, and rode on horseback from *Troy*, in that state, at the request of the defendant, to view the tract of land mentioned in the contract, though he had not seen the map or survey of the land, made by order of the government of the *United States*. He says, he passed over these tracts twice on horseback, and in crossing the land, he discovered a bed of mineral coal, on which several men were at work, digging up the coal, and it appeared to him to extend along the surface of the bank of the *Ohio*, for about 30 or 40 yards; and it was evident to him, "that the bed of coal was in its natural situation, and constituted a part of the land." That from the circumstance of there being "much coal in the neighbouring land," and from the appearance and extent of the bed of coal, he should suppose that it would yield a great quantity. That the bed of coal aforesaid was "on the bank of the river," and covered with water in the wet seasons, by the rise of the river. That when he saw it, the water was low, and the spot which he viewed could not be worked when the river was full; and it would

be necessary to sink a shaft on the bank above. That the *Ohio* is a public highway, and he does not know how high it rises.

Elias Rector is a postmaster at *St. Louis*, in the state of *Missouri*. He descended part of the *Ohio* river with the defendant, in 1809. He had, before that time, discovered that there was a quantity of mineral coal on the west side of the *Ohio*, in the state of *Indiana*, "some distance above" the mouth of *Anderson's* creek, and he went down the river for the purpose of showing the mineral coal to the defendant. He believes that there is a coal mine there, "as he has seen the coal in different places." He and the defendant, and others, took out of the mine some of the coal, for the purpose of trying it. He has seen coal "on that land, and on other tracts in the neighbourhood." The land he refers to "was just above the mouth of *Anderson's* creek." The coal was not found in the bed of the *Ohio*, and it was not a deposit, and he believes it to have been a mine of mineral coal; and the said coal mine, he believes, is not generaly covered with water, but he does not know the greatest height of the river, or the expense of working such a mine.

This is all the material testimony in the case, for I have not considered the testimony of *Latrobe* as having any bearing on the point, touching the truth and accuracy of the representations of the defendant, which were the inducement to the contract; and the examination of *Jacob Harvey* being after publication and the inspection of the testimony previously taken, was irregular.

The most precise, accurate, and authentic testimony on the subject is given by the two witnesses who reside in *Indiana*, near the land in question; and they disprove completely the allegations contained in the defendant's letter to *Fulton*. The coal mine, which may be deemed appurtenent to the land conveyed to *Fulton*, is in the bed of the river *Ohio*, and could not have been conveyed to *Fulton*, for that river is a navigable water, a great national highway,

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and does not belong to any individual. The representation was, that it was on the bank of the river, and the proof is, that it is in the bed of the river; this is a most material mistake or misrepresentation, and goes to the essence of the contract: nor could such a bed of coal be worked, but at enormous and ruinous expense, if the right of working it belonged to either of the parties. It is, for the most part of the year, under water, and the river rises from 30 to 40 feet, with a rapid current, which would probably defeat every effort to sink and maintain shafts on the spot. If the mine described by the two witnesses in *Indiana* be the mine intended, then the representation of the defendant was most essentially untrue. All his glowing descriptions of the fertility of the mine, and the facility of working it, are without proof. He states, that he procured some chaldrons of coal with the greatest ease, sufficient for constant use, in the voyage down to the *Natchez*, and to leave a surplus of 30 or 40 bushels; that at another time, he saw many thousands of bushels thrown up, and flats loading there, several of which had descended loaded to *New-Orleans*. It is impossible to reconcile this representation with that of the two witnesses who live in the neighbourhood, and who have both worked at the mine, in the bed of the river; and who state, that it never yielded beyond a very scanty supply, and is so covered with the waters of the river, that it never could be worked but at a very great expense.

Do the two witnesses, examined on the part of the defendant, restore truth or credit to his representations? If there had been colour for these assertions, it would seem that they must have been very susceptible of proof; for the matters to which they related were, from the nature of them, of great and general notoriety; yet we have but two witnesses, one a stranger in that country, or only a transient visiter, and the other does not appear to have been there since his visit with the defendant, in 1809; and

neither of them locate the land contained in the contract with any satisfactory precision. *T. C. White* rode over the tract on horseback, without having seen the map or survey of the land; and we are to presume the place is in a wild state without any definite boundaries. He discovered a bed of mineral coal, along the surface of the bank of the *Ohio*, and which would be covered with water in wet seasons, and he should judge it would yield a great quantity, from the appearance and extent of the bed, extending 30 or 40 yards, and from the circumstance of there being "much coal in the neighbouring land." This is a very lame and superficial account, and certainly leaves us in great doubt as to the identity of places. There is no resemblance to the spot described by the other two witnesses, and the neighbouring land he speaks of is understood to mean land not conveyed by the defendant. If there be much coal in the neighbouring land, it shows the necessity of a very precise location of places, and how easily mistakes may have been made by the two non-resident witnesses of the defendant.

Elias Rector speaks still more loosely. The land he refers to was "just above" the mouth of *Anderson's* creek; and he says, that before he went down the *Ohio* with the defendant, he had discovered coal "some distance above" *Anderson's* creek; and he believes there is a coal mine there, "as he has seen the coal in different places." It is worthy of notice, that he speaks very drily of his discovery, in company with the defendant, and only observes, that he and the defendant took some of the coal to try it; but he says nothing of slabs or squares of coal, and of loading the boat with chaldrons, and sufficient to have a superabundant quantity of 30 or 40 bushels, at the *Natchez*.

Upon the whole, I consider the representations made to *Fulton* as altogether fallacious, and that the consideration for the stipulation of such an extravagant annuity, did not

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exist in point of fact. Whether the defendant made the statements in his letter to *Fulton*, through mistake, or under the delusions of his own imagination, or by design, I am not able to say. It is sufficient for the decision of this case that the representations are not supported, but are contradicted by proof, and that the claim of the annuity upon such a state of the case is unconscientious and unjust.

The bill seeks to have the contract delivered up to be cancelled; but it has been partly executed, as the land described in the contract has been conveyed, and part of the consideration paid. The want of a coal mine corresponding with the representations of the defendant, seems to have been intended by the parties to apply to the *annuity*, as there was a provision in the contract itself, that if the mine should not be competent to yield a stipulated quantity of coal, after faithfully and scientifically working the same "and within the boundaries of the land described," the annuity should cease. It has not been so worked by *Fulton*, or his representatives, and it might therefore, be alleged, that the experiment intended has not been made. The answer to that objection is, that there was no coal mine within the boundaries of the land conveyed, but it was adjoining to it, in the bed of the *Ohio*; and this, if true in point of fact, (as I believe it to be) is a decisive answer to the objection. Another answer to it would be sufficient, if the mine was covered by the deed, and that is, that it would have been an idle, hopeless and ruinous project, to have attempted to work such a mine "scientifically, according to the plan and manner of working coal mines in *Europe*," in the middle of a mighty river, covering the spot most part of the year, and rising 40 feet, with a resistless current. It would be absurd to suppose, that *Fulton* was obliged to expend the whole amount of the accumulated annuity in the attempt, before he could be entitled to be discharged from the annuity. This would be making the end entirely subservient to the means.

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It is sufficient, that in the judgment of reasonable men, who had examined the spot, *and had actually worked upon it*, the attempt would have been useless, or attended with very great expense and hazard.

I shall accordingly decree that the defendant be perpetually enjoined from suing or prosecuting any suit pending at law, for the recovery of the annuity, or any part thereof, and that he also pay to the plaintiffs the costs of this suit.

Decree accordingly

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HIGHBOTHAM v. BURNET.

HIGHBOTHAM *against* BURNET and others.

Where there is a general demurrer to the whole bill, and it is bad in part, the whole will be overruled.

If a bill be for discovery only, and not for relief, a demurrer to the whole bill is bad.

Where the bill is for discovery and relief, the defendants should answer as to the discovery sought, and demur as to the relief.

E., a soldier, entitled to a lot of land, as a military bounty, in 1785, before the patent issued, by an agreement, sold the lot to *S.*, and bound himself to execute a deed of conveyance. *S.* sold and assigned the lot, bond, &c. in 1789, to *V.*, who, in 1790, by endorsement, sold and assigned the same, and *all his right, title, and interest* in the land, &c. to *C.*, to whom he delivered the original bond, agreement, and discharge of the soldier, and the patent for the lot: *Held*, that although, for want of words of inheritance, the assignment, *in law*, transferred only an estate *for life*; yet as it was clearly the intention of the parties to convey the whole estate, a *trust estate in fee* was to be considered as created and conveyed; and this Court would, therefore, decree an adequate legal conveyance in fee, according to the intention of the parties, notwithstanding the want of words of inheritance.

That *V.*, in such case, having stood by, for *thirteen* years, after the death of *C.*, and seen his heirs claiming to be owners in fee, under *C.*, and dealing with the land as absolute owners, and making very great and valuable improvements upon the property, without disclosing any claim to the reversion, or any pretension of right or title, he, and all persons claiming under him, were estopped, by his silence, from asserting his legal title.

February 24. THE bill stated, that lot No. 81, in *Manlius*, (part of the military bounty lands,) was patented to *Archibald Elliot*. That on the 17th of *January*, 1785, before the patent was issued, *Elliot*, by an agreement contained in the condition of a bond, sold the lot to *Leonard Smith*, and bound himself to execute a deed of conveyance. On the 4th of *November*, 1789, *Smith*, by an assignment endorsed on the bond, sold and assigned the lot and the bond to *William I. Vredenbergh*. The bond, with the assignment endorsed, was

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duly deposited in the office of the Clerk of *Onondaga*, pursuant to the act of 1794. On the 28th of *August*, 1790. *Vredenbergh* sold and assigned the bond, by an endorsement thereon, together with *all his right, title, and interest in and to the land*, to which he was entitled by the said bond, to *John Carpenter*: and *V.*, at the same time, delivered to *Carpenter* the patent for the lot, and *Elliot's* discharge from the army. About the year 1792, *Carpenter* conveyed the lot in fee to *Jeremiah Jackson*, who entered upon it, built a house and mills, and made valuable improvements. On the 25th of *June*, 1799, *Jackson* reconveyed the lot in fee to *Carpenter*, with warranty. *C.* entered on the premises, and continued in possession, until his death, in *February*, 1800. In *February*, 1806, a partition of the lands of *C.* was made among his heirs, pursuant to the statute, and the premises in question were allotted to the share of his son, *Benjamin C.* Ever since the conveyance of *Jackson* to *John C.*, he and his heirs have been in the peaceable occupation of the premises, to the present time. Since his death, (and since the right, if any, of the heirs of *V.* had accrued,) several houses, mills, barns, &c. have been erected on the premises, and other improvements made, to the value of eighteen thousand dollars. That *Vredenbergh*, at the time of the death of *John C.*, lived at *Marcellus*, within twenty miles of the premises, and continued to reside there until his death, in 1813; and he was well acquainted with the improvements making on the premises. The plaintiffs are severally seized in fee of parts of the lot, under *Benjamin C.*; and the defendants are the children and heirs of *Vredenbergh*.

The bill further stated, that *Vredenbergh*, at all times, and particularly after the death of *John C.*, disclaimed all interest in the lot, declaring that his whole interest had been conveyed to *J. C.*, and that his heirs were seized thereof in fee. That the heirs of *V.* claim the lot, denying that any other than an *estate for life* was conveyed by their father, for want of words of inheritance. But the plaintiffs charged, that

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the conveyance to *J. C.* was intended to create, and did create an estate in fee. That in *May*, 1820, the defendants brought actions of ejectment against the plaintiffs, to recover possession of the premises. The plaintiffs prayed a discovery as to the facts stated in the bill, and for a release from the defendants of any claim to the lot, and that they may be enjoined, &c. and for other relief, &c. An injunction was, accordingly, awarded.

The defendants demurred to the bill: 1. Because the plaintiffs claiming to be seized in fee of the premises, under the conveyance from *V.*, it was a *question of law* only. 2. Because the bill contained no matter of equity.

Gold and *Sill*, for the plaintiffs.

M. Van Buren, contra.

THE CHANCELLOR. This is a demurrer to the whole bill, and there are two causes of demurrer assigned, (1.) That the plaintiffs claim to be seized in fee of the premises, and therefore the matter is properly and exclusively cognizable at law. (2.) That the bill contains no matter of equity.

Perhaps it would be sufficient to dispose of the demurrer, by referring to the rule, (*Leight* v. *Morgan*, 1 *Johns. Cases*, 429.) that if a demurrer be general to the whole bill, and be bad in part, it must be overruled. If it be good for discovery, and not for relief, a general demurrer to the whole bill is bad. The defendants should in such a case give the the discovery, and demur to the relief; and this rule was so settled, in the case referred to, in the Court of Errors. I cannot see any doubt, in this case, of the right of the plaintiffs to a discovery concerning the deeds charged in the bill to have been lost, and concerning their contents.

But the bill appears to me to state several distinct and sufficient heads of equity jurisdiction.

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It is easy to perceive, that the real ground of the claim of the defendants, as heirs of *Vredenbergh*, rests on the defective conveyance from him to *John Carpenter*, under whom the plaintiffs claim title; and that defect consists in the omission of words of inheritance, the want of which, I apprehend, would confine the operation of the assignment, in a Court of law, to an estate for life. But when the right of the soldier rested originally in equity, and continued so when he conveyed his right to *Smith*, and when *Smith* transferred that right to *Vredenbergh*, and when we consider the charge in the bill that *Vredenbergh* and *Carpenter* negotiated and agreed for the sale and purchase of that entire right, and the circumstances attending the assignment from *V.* to *C.* and the language and mode of the assignment, and the accompanying delivery of the patent and original discharge of the soldier, there is good cause to infer a mistake in that assignment; and that owing to a defect in drawing it, the intention of the parties was not carried into effect. To remedy this defect, and to prevent an unconscientious advantage being taken of it, may afford a very fit case for equitable interposition. Under such special circumstances, a trust in fee may be considered as created, which this Court would execute according to the conscience and intention of the parties. There are many cases at common law in which a fee has been held to pass without the word heirs; (*Co. Litt.* 9. *b.*) and if a trust interest in fee *was intended* to be created by the assignment from *V.* to *C.*, in like manner as a trust interest in fee *was conveyed* by the deed from *Elliot* to *Smith*, and by the assignment from *Smith* to *Vredenbergh*, then this Court, according to the doctrine in *Fisher* v. *Fields*, (10 *Johns. Rep.* 495.) would decree an adequate legal conveyance, according to that intention, notwithstanding the want of words of inheritance.

The allegations in the bill on which so much stress has been laid by the counsel for the defendants, that the plain-

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tiffs were seized of the land in question, must be understood to mean an equitable, and not a legal seisin. The whole scope of the bill, and the very fact of coming into this Court, demonstrate this meaning.

The bill also states facts, from which we are to infer, that *Vredenbergh* and his heirs, the present defendants, are equitably estopped from asserting any claim to a reversionary interest in the land. It is charged, that *V.* after the death of *Carpenter* for 13 years, stood by and saw great and costly improvements made upon the land, by persons claiming, and believing themselves to be owners in fee, under *Carpenter*, and never interposed any pretension of right or title. It appears from the cases referred to in *Wendell* v. *Van Rensselaer*, (1 *Johns. Ch. Rep.* 354.) that though the right of the party, who thus misleads third persons by his silence, be merely a reversionary interest, and subject to a life estate, in the very person whom he suffers to deal with the property as absolute owner, the rule of equity still applies, that he never shall be permitted to exercise his legal title against such person. He is bound, and all persons claiming under him, are bound, by his silence. This case is much stronger than ordinary ones of the kind; for here the silence was maintained for thirteen years, after the assumed life interest of *Carpenter* had terminated. If *Carpenter* was bound to know the duration of his title, those who succeeded to the estate, after his death, were certainly encouraged and misled by the studied silence or express admissions of *Vredenbergh*; and the case as stated, presents one of the strongest claims for the assistance of this Court against the assertion of a title under him by his heirs. It is to be traced up to imposition and fraud.

The demurrer must, therefore, be overruled with costs, and the defendant ordered to answer.

Order accordingly.

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BILLINGS
v.
RATTOON.

BILLINGS and another *against* RATTOON and others.

Notice of the rule to pass publication must be served on the defendant's solicitor, or his agent; and if it is served on the agent, the time of service must be double, as in other cases, or for six weeks.

MOTION, on the part of the defendants, to enlarge publication, and for leave to examine witnesses, on affidavit of the solicitor for the defendants, and of one of the defendants, that interrogatories on the part of the defendants, with the names of the witnesses, &c., and the time and place of examination were served on the solicitor for the plaintiffs, on the 8th inst.; and that on the 9th inst. he first received notice, that the rule that publication pass had been entered on the 31st of *January* with the register, the rule of three weeks to pass publication having then expired. The affidavit further stated, that neither the solicitor for the defendants, nor the defendants, had seen or read the depositions, or been informed of their contents. That the defendants have several material witnesses to examine, and if due notice of the rules to produce witnesses and pass publication had been entered, they would have been examined. *February 26th.*

It appeared further, by an affidavit in opposition to the motion, that the ordinary rule to pass publication in three weeks, under the 20th printed rule of the Court, was entered on the 29th of *December* last; and that a copy of the same was served on the agent for the defendant's solicitor, on the 5th of *January* last.

A question of practice arose whether service of the rule was necessary; and if necessary, whether the rule of the 31st of *January* was not entered prematurely.

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BILLINGS v. RATTOON.

D. Russell, for the motion.

S. A. Foote, contra.

THE CHANCELLOR. When the practice of the *English* Court of Chancery required the rule for publication to be entered, not only in the register's book, but in the book of one of the six clerks, and that the clerk entering the rule should give notice of it to the clerk of the adverse party, (*Beame's Orders, p.* 336. *Newland's Pr.* 143.) the object of the practice was to speed the client, and prevent him from being surprised by unexpectedly closing upon him the opportunity to take testimony. Notice of such an important measure as closing the testimony is as reasonable, if not as necessary, as of any other step taken in the cause; and when notice is given to the solicitor, *through his agent*, the 46th rule of the Court applies, that the time of service must be double. The meaning of the rule is, that publication passes in three weeks (unless enlarged) from the service of notice, or in double that time, if service be on the agent.

The rule to pass publication did not therefore expire in these cases, until six weeks from the 5th of *January*; and the rule that publication be passed, was entered prematurely.

The rule to pass publication, consequently, must be enlarged for three weeks, when publication will pass, without further order; and as the practice appears to have been unsettled, let the costs of the motion abide the event of the suit.

Order accordingly.

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SKINNER v. DAYTON.

SKINNER *against* DAYTON and others.

An irregularity of practice, or defective notice, will be cured by a neglect to complain of it in due season.

As where a party, who had not received due notice of the examination of witnesses before commissioners, suffered ten months, or three terms to elapse, before making application to the Court, he was held to have waived, by this delay, any right to cross-examine the witnesses, or to object a want of notice.

MOTION on the part of the plaintiff, to suppress certain depositions taken on the part of the defendants, for irregularity, on an affidavit of the plaintiff's solicitor, stating, that the interrogatories were left at his office, on the 11th day of *May*, 1820, with notice, that the witnesses would be examined before commissioners, on the 13th of *May*. That the solicitor was absent from home, when the notice was served, and did not return until after the day. That the solicitor did not, to his recollection, receive notice from the commissioners of the day and place of examining witnesses, under the defendant's commission. That the witnesses were examined on the direct interrogatories of the defendants on the 13th, 15th, and 16th of *May*, and the commission returned on the 18th of *May*, 1820. *March 28th.*

The affidavit of the defendants' solicitor was read, in opposition to the motion, stating that the plaintiff's solicitor had consented to the commissioners named in the defendants' commission. That the deponent, hearing that no cross interrogatories had been filed, asked the plaintiff's solicitor, a short time after the execution of the commission, if he had received notice of executing the commission, and was answered in the affirmative. That the deponent then offered to consent, in writing, that the plaintiff's solicitor might file cross interrogatories, and examine the witnesses; but the

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plaintiff's solicitor replied, that he did not wish to file cross interrogatories, and made no complaint of any irregularity; and the deponent heard nothing more on the subject until the cause was set down for hearing, and notice of the present motion for this term.

Henry, for the motion.

Z. R. Shipherd, contra.

THE CHANCELLOR. The irregularity complained of has been waived by the acquiescence and delay of the plaintiff's solicitor. This Court observed, in the case of the *Executors of Brasher* v. *Van Courtlandt*, (2 *Johns. Ch. Rep.* 249.) that irregularities in practice, and defective notices, might be cured by neglect to complain in due season; and that there was good sense in the practice of the Courts of law on this point. Here has been a delay of ten months; and three terms have been suffered to elapse, after notice of the examination, and after a very reasonable offer to cure the defect had been made and declined. There is no reason or justice in the present application. The opportunity to cross-examine has been expressly waived.

Motion denied.

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KEMPSHALL v. STOBB.

KEMPSHALL *against* STOBB.

This Court does not, unless in a very special case, sustain a bill, merely for the assessment of damages for the breach of an agreement.

The defendant, who had entered into articles of agreement with the plaintiff, for the sale and conveyance of a lot of land, after the time of performance had elapsed, sold and conveyed the land to a third person, for a valuable consideration, without notice of the agreement, and before the filing of a bill by the plaintiff, for a specific performance of it: *Held*, that a specific performance could not be decreed; and that the plaintiff must seek his remedy at law, for a compensation in damages, for the breach of the agreement.

THE bill stated that the defendant, being seized of a lot of land and mill seat, the plaintiff, in *January*, 1815, entered into articles of agreement with him for the purchase thereof; and the defendant, in consideration of five hundred dollars, covenanted to convey in fee, to the plaintiff, on the 1st of *May*, 1816, the lot of land, &c. (describing it by metes and bounds) to cut a canal, &c., and make a road, &c. The canal to conduct the water from the river to the mill was to be completed by the 1st of *August*, 1815. That the plaintiff, on his part, agreed to pay the defendant the five hundred dollars, as follows: fifty dollars at the date of the agreement, two hundred dollars on the the 1st of *May*, 1815, and two hundred and fifty dollars on the 1st of *May*, 1816, with interest; and the parties bound themselves to each other, for the due performance of the agreement, in one thousand dollars, &c. The bill further stated, that the plaintiff paid the two first instalments, which were endorsed on the agreement. That the defendant, between the 1st and 10th of *May*, 1816, verbally agreed to extend the time of payment of the last instalment; and the plaintiff understood that it was to be delayed, until the canal was com- *April* 14th.

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pleted, which was essential to his enjoyment of the mill seat: but which was not commenced, until the summer of 1817, and was completed in *September*, of that year. That on the 11th of *September*, a few days before the completion of the canal, the plaintiff tendered to the defendant the 250 dollars, with interest, being the balance due on the agreement, and demanded a deed; but the defendant refused to give a deed or to pay the plaintiff the damages he had sustained, or to refund the money he had received of the plaintiff. The plaintiff *prayed* for a specific performance of the agreement, on the part of the defendant, by the delivery of a deed and possession, and for general relief, &c.

The defendant, in his answer, denied that he ever agreed to extend the time of payment of the third instalment. He stated, that when the plaintiff made the tender, in *September*, 1817, he informed him, that he considered the contract as vacated by the non-payment, and had sold the land to other persons. That the plaintiff, at various times, subsequent to the 1st of *May*, 1816, applied to the defendant, to refund the money he had paid, alleging that the agreement was at an end; but the defendant refused to refund it, on account of the disappointment, trouble, and expense he had incurred, by reason of the non-payment of the money, according to the contract. That considering the agreement at an end, the defendant, on the 6th of *May*, 1817, conveyed the land, in fee, to *E. Johnson*, for a valuable consideration, and without notice of the agreement. The defendant submitted, that the remedy of the plaintiff, if any, was at law, and prayed the benefit of this objection, as if he had demurred.

Jones and *Baldwin*, for the plaintiff.

P. S. Parker, contra.

THE CHANCELLOR. This is a bill for the specific per-

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formance of a contract, for the conveyance of land. The defendant sets up matter of excuse in his answer, and states that he had, on the 6th of *May*, 1817, which was long after the time he had agreed to convey to the plaintiff, and some time before the filing of the bill, conveyed the land in question to a third person, for a valuable consideration, and without notice to such grantee of the agreement. It is to be inferred from the facts in proof, and particularly from the testimony of *Elisha Johnson*, that the plaintiff was informed of the fact of this conveyance a considerable time previous to the commencement of the suit, and though the plaintiff may have a just and valid claim to compensation, in damages, for breach of the agreement, yet the question is, whether this Court ought to sustain the bill, under the circumstances of the case, for the purpose of having these damages assessed and awarded. The defendant insists, in his answer, that the plaintiff's remedy, if any, is at law.

The jurisdiction of the Court, on this point, was discussed in the case of *Hatch* v. *Cobb*, (4 *Johns. Ch. Rep.* 559.) and it was considered, that the Court ought not, except in very special cases, to sustain a bill merely for the assessment of damages. The more I have reflected on the subject, the more strongly do I incline to that opinion. Lord *Eldon* intimated, in *Todd* v. *Gee*, (17 *Vesey*, 273.) that the whole course of previous authority was against the decision of Lord *Kenyon*, in *Denton* v. *Stewart*; (1 *Cox*, 258.) and in that case, Lord *Eldon* said, the defendant had disabled himself, *pendente lite*, from performing the agreement; and *that* fact materially distinguishes that case from this. When the defendant had disabled himself before the filing the bill, and the plaintiff *knew* of that fact before he commenced his suit, (and I consider such knowledge a material circumstance in the case,) it is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal, and not of equitable ju-

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risdiction. The remedy is clear and perfect at law, by an action upon the covenant; and if this Court is to sustain such a bill, I do not see why it might not equally sustain one in every other case sounding in damages, and cognizable at law.

This Court is not the ordinary and appropriate tribunal for such actions.

Bill dismissed without costs.

SCHUYLER and others *against* HOYLE and his wife.

If a husband appoints an attorney to recover a debt, legacy, &c., due to his wife, and the attorney receives the money; or if the husband mortgages his wife's interest, or assigns it absolutely, for a valuable consideration, or if he recovers it by a suit at law, in his own name, or releases the debt, the right of survivorship in the wife, in these cases, ceases.

In a suit by the husband for the wife's legacy or distributive share, the wife must be made a party.

Where the husband and wife, and others, heirs of *F.* deceased, intestate in *England*, made a joint power of attorney to *V.*, authorizing him to take out letters of administration there on the estate of *F.*, to collect the property, &c., and pay over to the parties their distributive shares, respectively, &c.; and after *V.* had taken out administration, and obtained possession of the property, but before he had paid over the entire share, the husband died: *Held*, that the wife was entitled, in her own right, as survivor, to that portion of her distributive share, which had not been actually paid over to her husband.

April 27th. THE bill stated, that *Henry Ten Eyck Schuyler* died seized of a large real and personal estate, *intestate*, on the 25th of *September*, 1812, leaving *Sally S.* a *widow*, mother of the plaintiffs, and the plaintiffs, and *J. B. S.* his only children; and that *J. B. S.* died an infant, on the 16th of *January*, 1817. That on the death of the intestate, the

widow, as natural guardian to the plaintiffs, took possession of the real estate, and from the death of the intestate, until her marriage with the defendant, *Henry Hoyle*, received the rents and profits. That she possessed herself of the personal estate, and sold a large part thereof. That since her marriage with *H.* on the 30th of *January*, 1817, the defendant *H.*, her husband, had received the rents and profits of the real estate, and possessed himself of the personal estate, which remained in her hands, to the amount of 50,000 dollars. That the defendants had possessed themselves of all the deeds and muniments of the estate, and had refused to account, &c. *Prayer*, that the defendants be decreed to account with the plaintiffs, touching the real and personal estate of the intestate, and for general relief, &c.

The material facts appearing in the *answer*, and from the *proofs* taken before the master, in regard to the question argued and decided, are, that Mrs. *S.*, widow of the intestate, now Mrs. *Hoyle*, was one of the heirs at law of *Gerrit Fisher*, who died intestate, in *England*, prior to *June*, 1811, leaving a large personal estate, of which she, as one of the heirs and next of kin, was entitled to one *twelfth*, as her distributive share. She succeeded to that share while she was the wife of *H. T. E. Schuyler*; and on the 19th of *June*, 1811, the legal representatives of *Gerrit F.* entered into an agreement, by deed, with *N. I. Visscher*, to which instrument *S.* was a party, and which also purported to be made by *his wife*, as a party, but was not, in fact, executed by her. This agreement recited that a letter of attorney had been executed by the *said parties* to that deed, (being the legal representatives of *G. F.*) and, of course, by "*Henry Ten Eyck Schuyler* and *S.*, his wife," to *N. J. V.*, authorizing him to proceed to *London*, and there sue out letters of administration, and collect the property of *G. F.* deceased, and pay his

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debts; and after deducting reasonable expenses, and a reasonable sum stipulated for his own compensation, to pay over "to the said parties of the second part respectively," which, of course, included *S.* and his wife, their respective distributive shares. The agreement then provided that *N. J. V.* should proceed forthwith to *England*, and there, in the mode he should deem best, should execute the power; and after paying the debts, and deducting expenses, and a reasonable sum to cover allowances for his services, to remit the residue of the property of *G. F.*, the intestate, to *Thomas Eddy* of *New-York*, to be by him deposited in the *Bank of New-York*, in the name of *N. J. V.*, and to be by him distributed as before mentioned. The rest of the agreement related to the compensation to be allowed to *N. J. V.*

Under this authority, *N. J. V.* went to *England*, where he arrived in *August*, 1811, and took out letters of administration on the estate of *G. F.*, in *England*; and on the 12th of *October*, 1811, he took out letters of administration on the intestate's estate in *Ireland*, and collected and converted most of the assets into *American* stocks and *British* goods, within one year after he arrived in *England*. He remitted the stocks to *Barent Bleecker* of *Albany*, and the goods to *Peter Remsen* of *New-York*, who sold the goods, and paid the proceeds to *N. J. V.*, with whom, in character of administrator, *P. R.* accounted, and to whom, as his principal, he paid the proceeds.—*H. T. E. Schuyler* died the 25th of *September*, 1812, subsequent to which time, *P. R.* paid the proceeds of the goods, amounting to 400,000 dollars to *N. J. V.*, who, afterwards, paid the amount over to *B. Bleecker*, to be distributed among the heirs of *G. F.* The stocks remitted by *N. J. V.* to *Bleecker*, came into his hands before the death of *S.* The amount received by *B.* prior to the death of *S.*, was 123,078 dollars and fifty-eight cents, and the amount received by him after the

death of *S.*, was about 400,000 dollars. The amount of the distributive share of Mrs. *S.*, was 48,342 dollars and 98 cents, including 1950 dollars, being the value of certain lands belonging to the estate, not sold before the death of *S.* Of this distributive share *B.* paid to *S.* in his life time, 11,815 dollars and 29 cents, and the residue to his widow, (now Mrs. *H.*) after his death. So that *S.* received, during his life, above 1500 dollars more than his wife's distributive share of that portion of the estate of *G. F.*, which came to the hands of *B.* in the life time of *S.*

In the receipt of the moneys, and in the transaction of the business, *B.* acted under letters of attorney, dated *January* 6, 1812, from the legal representatives of *G. F.*, and which was executed by *S.* "in behalf of his wife, *Sarah Ten Eyck Schuyler.*" This power authorized *B.*, as their attorney, to demand, sue for, collect, and receive all debts and moneys due *G. F.* at the time of his death, and to take security in their names, if requisite, to liquidate debts and demands, and to pay debts due from the estate of *G. F.*, or from them as heirs, and to sue out letters of administration on the estate of *G. F.*, if necessary, and to sell at auction such parts of the estate as he should deem best, and, after deducting expenses and allowances, to distribute the estate, as follows, "amongst us, our heirs, executors, administrators, or assigns, according to our respective rights in, and to the real and personal estate of, *G. F.*"

Buel, for the plaintiffs, contended, 1. That upon the death of *Gerrit Fisher*, the distributive share of the wife of *H. T. E. Schuyler*, in his estate, became absolutely vested in her husband. Such distributive share becomes vested from the time of the death of the intestate; (except in the case of a posthumous child;) so that if the person entitled to it, die within a year after the intestate, and before the estate is actually divided, the share goes to the next of kin of the deceased.

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(*Toller's Law of Executors*, 386. 1 *Madd. Ch.* 517. 3 *Bac. Abr.* 75. *tit. Executors*, &c. 1.) In *Browne* v. *Shore* and wife, (1 *Shower*, 25.) *J. S.* died intestate, and *A.* and *B.* who were his next of kin, died within a year after, and before distribution of the intestate's estate: *Holt*, Ch. J., and the rest of the Court, held, that *A.* had a vested interest, which went to his *executors*. In *Cary* v. *Taylor*, (2 *Vern.* 302.) *A.* married *B.*, the daughter of *J. S.*, who died intestate. *B.* died before the distribution of her father's estate. *A.* also died before distribution or administration. The plaintiff was administrator to *A.*, the husband, and the defendant was the administrator of *B.*, the wife; and the question was, which of them had the right to the share of *J. S.'s* estate, remaining undistributed. It was admitted, on all hands, that the share to which *B.* was entitled, was a *vested* interest, before any distribution was made; but the doubt was, whether it was so vested, as *a legacy assented to*, that it would vest in the husband, without his taking administration to his wife. The question does not appear to have been decided in that case; but the doubt raised was not well founded. *Comyns* (2 *Comyn's Dig. tit. Baron and Feme*, E. 3. 2 *Roll.* 134.) says, "If a legacy be given to a *feme covert*, to be paid in twelve months after the testator's death, and the wife dies within the twelve months, the interest goes to the husband, for it was vested in him, and he might release it within the twelve months." (*Robertson* v. *Taylor*, 2 *Bro. Ch. C.* 589. 2 *P. Wms.* 49. *n. d. Grice* v. *Grice*, *Edwards* v. *Freeman*, 2 *P. Wms.* 441.) The doubt in *Cary* v. *Taylor*, seems to have arisen from the circumstance, that the husband had not administered on the wife's estate. But it is now well settled, that this circumstance is of no moment; for the wife's *choses in action* go to the representatives of the husband, although he has not administered on her estate, and not to the wife's next of kin. (*Whitaker* v. *Whitaker*, 6 *Johns. Rep.* 112.)

It follows, then, that a distributive share is *a vested* inte-

rest from the time of the intestate's death; and it must *vest* in the *husband*, not in the wife; for a married woman cannot, during coverture, acquire any property, unless given specially to her *separate use*, and through the medium of *trustees*. All her acquisitions of personal property, during coverture, belong to her husband. For this reason, *indebitatus assumpsit* for work done by the wife, will not lie by the husband and wife, but the husband must sue alone. (2 *Comyn's Dig. tit. Baron and Feme, W.* 1 *Salk.* 114. 1 *Chitty's Pl.* 19.) A note given to the wife, during coverture, is part of the husband's assets. (*Hodges* v. *Beverly, Bunb. Rep.* 188.) So, if a bond is given to the wife, the husband must sue alone for it. (2 *Atk.* 208. 2 *Mod.* 217. 4 *Term Rep.* 616. 3 *Lev.* 403.) Where a legacy was given to a *feme covert*, who lived separate from her husband, and the executor paid it to the wife, and took her receipt, yet on a bill brought by the husband, the executor was decreed to pay it over again, with interest. (1 *Bac. Abr. tit. Baron and Feme, D.* 1 *Vern.* 261.)

The cases which seem to support a contrary doctrine, or to recognize the right of survivorship in the wife, as to her *choses in action*, are those in which the wife was entitled to them *before marriage*, and they had not vested in the husband; or where the husband had elected to sanction the wife's right of survivorship, by joining with her in an action, &c.; or where bonds, notes, &c. have been taken to the husband and wife jointly, and the husband has done no act to alter the property, and thus impliedly assented to her right of survivorship. (*Comyn's Dig. tit. Baron and Feme, F.* 1. *F.* 2. 1 *Vern.* 396. 1 *Fonbl. Equ. B.* 1. *ch.* 4. *s.* 24. *n.* (*y.*) Both *Comyn* and *Bacon*, as well as others, make the distinction between property, or *choses in action*, to which the wife was entitled *before* marriage, and such as accrue to her, during coverture; and they all agree that the husband has an *absolute property* in all the acquisitions of the wife, during coverture, whether by gift, devise, or by her labour. (*Comyn's*

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Dig. Baron and Feme, E. 3. Bac. Abr. Baron and Feme, D. C. 3. 2 Roll. 134. Comyn's Rep. 725.)

This doctrine is also fully recognized by Judge *Reeves*, in his work on "*Domestic Relations*," p. 60. 63. He says, "personal property acquired *after marriage*, by her means, belongs absolutely to the husband; so that if a legacy should be given to the wife, during coverture, and the husband should die before it is paid, or due, it would not belong to the wife, but to the husband's executor." He asserts the same thing in regard to the wife's distributive share; and *Toller* says, that a distributive share is just like a residuary legacy.

2. But if it was necessary that S. should have altered the property in order to vest the title in him, enough has been done by him for that purpose. He, together with the others, executed a power to *V.* to collect the property, by virtue of which *V.* took out administration in *England*, and collected all the property, before the death of *S.* So that *Bleecker* was the attorney in fact of *S.* and the others in this country, and acted under the power. Now, it is well settled, that if a husband gives a power of attorney to recover his wife's debt, legacy, or other *chose in action*, and the attorney does receive it, although it does not actually come to the hands of the husband, yet it is, absolutely and indefeasibly, his property. (1 *Bac. Abr.* 480. *tit. Baron and Feme, C.* 3. *Roll. Abr.* 342. *Moore*, 452. *Golds.* 160. *Reeves' Dom. Relat.* 4. *Conyn's. Dig. tit. Baron and Feme E.* 3. A voluntary assignment by the husband of his wife's distributive share, makes it the property of the husband, though the assignment, as between him and the assignee, is void. (1 *P. Wms.* 380.) So, an order of the Court of Chancery to pay the wife's legacy to the husband, vests it in the husband, though he dies before payment, and defeats the wife's right of survivorship. (3 *Bro. C. C.* 362.) So, a judgment recovered at law, by the husband, has the same effect; (1 *Fonbl. Equ. B.* 1 *ch.* 4 *sec.* 24.) though it is

otherwise, if the husband is joined. The principle on which these cases are founded is, that where the husband has done any act in relation to his wife's *choses in action*, manifesting his intention to appropriate them to himself, the law deems it such a reduction into his possession, as vests him with the property.

J. Paine, contra, contended, 1. That the husband has only a qualified interest in his wife's *choses in action*; and unless he reduces them into possession, by action, or otherwise, during his life, they belong to the wife, in case she survives him. (*Toller's L. of Ex.* 219. *B.* 2. *ch.* 5. *s.* 2. 3 *Vesey*, 469. *Co. Litt.* 351. *b.* 9 *Vesey*, 87.) It is true, that if the husband survives the wife, he alone is entitled to her personal property, or *choses in action*. (6 *Johns. Rep.* 112. 1 *N. R. L.* 314. *s.* 17. *Co. Litt.* 351. *b.*)

2. What acts, then, were done by *S.* in his life time, to reduce the distributive share of his wife in the estate of *G. F.* to his possession? The power of attorney to *V.* was in the name of *S and his wife*, and the other persons; and *V.* was to pay over her share, after deducting charges, &c. to *S. and his wife*. This was the only authority under which *V.* acted. Though the agreement was not, in fact, executed by the wife of *S.*, yet she was made a party, and it *recites* the power of attorney, and that the *said* parties executed the power. It must be taken, as fact, therefore, that *S. and his wife* executed the power, and *V.* was to pay over her distributive share to herself and husband jointly.

Admitting, then, the rule of law to be, (*Toller*, 221, 222.) that if the husband gives a letter of attorney, to receive a debt or legacy due to his wife, and the attorney receives it, but the husband dies before it it is paid over to him, it will go to his executors, it does not follow, that it will be considered as reduced to the possession of the husband, where the power, as in this case, is given by the husband and wife,

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jointly, and the attorney is to pay over the money to them jointly. The husband may sue alone for the debt or legacy due to his wife; but if he joins the wife, and recovers judgment, it will survive to her. (1 *Fonbl. Equ.* 314. *n.* *Toller's L. E.* 220. 4 *Hen. & Munf. Virg. Rep.* 452.) The reason of the distinction is, that by bringing the action in his own name, he signifies his disagreement to the wife's interest, and his intent that it shall not survive to her; but where the action and recovery is in their joint names, it shows that his intention is not to alter the property. (*Wildman* v. *Wildman*, 9 *Vesey*, 176.) In *Baker* v. *Hall*, 12 *Vesey*, 496.) where the husband entered into possession of the real and personal estate of the testator, as executor and trustee under the will, and disposed of part, the Master of the Rolls held, that the husband must be deemed to have taken possession as executor and trustee only, and that, therefore, his wife's share of the residue of the testator's estate, could not be considered as so reduced to the possession of the husband as to prevent its surviving to the wife, upon his decease; and, of course going, upon her death, to her personal representatives. So, in the case of *Wall* v. *Tomlinson*, (16 *Vesey*, 413.) the Master of the Rolls held, that stock belonging to the wife was not reduced to the possession of the husband by a transfer to him merely as trustee; for the transfer was made *diverso intuitu*. If, then, the principles deduced from these authorities be correct, it might be safely admitted, that *V.* had, by virtue of the power from *S.* *and his wife*, and the others, obtained full possession of all the property, in the life time of *S.* But the fact is, that the estate of *G. F.*, which consisted principally in *Bank of England* and *British* government stocks, was not transferred to him, as the agent or attorney of the legal representatives of the intestate, but in his character of *administrator*. He could not have obtained the property except as administrator. Having duly obtained letters of administration on the estate, according to the laws of that country, his character as agent

or attorney ceased, or became merged in that of administrator. If the property had been transferred to *S.* himself, as *administrator* of the estate of *G. F.* the possession, according to the cases which have been cited, would not have been such as to prevent, in case of his death, his wife's claim as survivor. *A fortiori*, then the possession of *V.* as administrator, would not be sufficient to produce that effect. The claim or interest of *S.* was only under the statute of distribution, or a mere *chose in action*. (3 *Vesey*, 469.) Again; *S.* could not, at the time of his death, have enforced that claim, either at law, or in equity. *V.* arrived in *England*, in *August*, 1811; the date of the letters of administration granted to him in *England*, does not appear. Those in *Ireland* were dated *October* 12, 1812. *S.* died, *September* 26th, 1812. A year, therefore, had not elapsed at the death of *S.*; and by the statute of 22 and 23 *Charles I. c.* 10. no distribution of an intestate's estate can be made, until after the expiration of one year from the time of granting administration; and the administrator is allowed a year to render his account, and close the estate. (*Toller*, 97.)

But admitting that *S.* could have enforced his claim for his wife's share, it must have been in a Court of Equity, not in a Court of Law; (5 *Term. Rep.* 692. 5 *Vesey*, 516. *Toller's Law of Ex.* 479. 489.) and she must have been joined in the suit. (1 *Madd. Ch.* 384. 1 *Fonbl. Equ.* 318. 3 *Vesey*, 469. 5 *Vesey*, 516.) And if he died pending the suit, the right would survive to her; or if there had been a decree, she would have had the benefit of it. (1 *Ch. Cas.* 27. 4 *Hen. & Munf. Virg. Rep.* 452.)

THE CHANCELLOR. The question submitted in this case is, how far, and to what extent, *Henry T. E. Schuyler*, deceased, had reduced to possession the distributive share belonging to his wife, of the estate of *Gerrit Fisher*, deceased, so as to be enabled to transmit the same, as part of his per-

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sonal estate, to the plaintiffs, his children, and prevent it from surviving to his wife?

After stating the facts of the case, his Honour proceeded:

The only point in the case, arising from these facts, is, whether the distributive share of the 400,000 dollars, belonging to Mrs. *Schuyler*, and which came from *N. J. V.*, the administrator, to *Bleecker*, after the death of *S.*, did, or did not survive to the wife, as not having been reduced to possession by the husband, in his lifetime. I am relieved from the necessity of examining into the effect of the receipts by *B.*, prior to the husband's death, because his wife's share, and more than his wife's share of those receipts, were paid over to the husband. After looking into the authorities which have been referred to by the counsel, and upon a consideration of the doctrine of the cases, there remains no doubt in my mind, that the wife was entitled, as survivor, to all that portion of her distributive share which was not paid over to *Bleecker*, but remained in the hands of the administrator of *F.* at the time of her husband's death. There is not even colour for the pretension on the part of the plaintiffs, that the assets of *F.*, the intestate, which were in the hands of his administrator on the death of *S.*, were to be considered as no longer things in action, and held by him, as administrator, but as actually reduced to the husband's possession, so as to cut off the right of survivorship in the wife.

As I do not know that this question has ever been discussed in this Court, it will be satisfactory to review some of the leading cases.

We have no concern, at present, with the doctrine that establishes the husband's right to his wife's *choses in action*, in case he survives her. It appears to be settled, that he is, in that event, entitled to them, whether they were or were not reduced to possession by him, in her lifetime. Her whole personal estate in action, as well as in possession, vests in the husband upon her death, for his right to administer on her personal estate includes a right to her *choses in action*.

They vest in him by the statute of distributions, as her next of kin. (*Squib* v. *Wyn*, 1 *P. Wms.* 378. *Cart* v. *Rees*, cited, *ib.* 381. *Elliot* v. *Collier*, 3 *Atk.* 526. *Humphrey* v. *Buller*, 1 *Atk.* 458. *Co. Litt.* 351. *a.* note 304. *Whitaker* v. *Whitaker*, 6 *Johns. Rep.* 102.)

Nor have we any concern, at present, with the doctrine, that if the husband and wife give a letter of attorney to a third person, to receive a legacy due to the wife, as was the case in *Huntley* v. *Griffith*, (*Gouldsb. Rep.* 159. *Moore*, 452. *S. C.*) or if he alone gives a letter of attorney, according to the *dicta* of the judges in that case, a receipt by the attorney changes the property of the legacy, and transfers it to the possession of the husband. That doctrine does not apply, because the attorney, in the present case, did not receive the property for which the defendants are sought to be accountable, until after the husband's death. The present inquiry then is, whether there was any such interference, or change of the wife's property, by the husband, before his death, though it did not come actually into his possession, or into that of his attorney, as to take away the right of survivorship in the wife? And for the more full illustration of the point, we will see what acts the husband may do, to affect the wife's property, without reducing it to actual possession.

In the first place, he may assign, for a valuable consideration, his wife's *choses in action*. This was agreed to in *Carteret* v. *Paschal*, (3 *P. Wms.* 197.) and expressly decided in *Bates* v. *Dandy*, (2 *Atk.* 206.) The wife, in the last case, became entitled, during coverture, to a distributive share of an intestate's estate, and that share consisted of two mortgages, which the husband took and left with a creditor, under a promise to assign them, by way of security; but died before actual assignment. Lord *Hardwicke* held this to be an assignment in equity, *pro tanto*, so far as the debt to the creditor was concerned, and that though the husband might have disposed of the whole interest, yet as he did not, the residue of interest in the mortgages belonged to the wife

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surviving her husband. So, again, in *Jewson* v. *Moulson*, (2 *Atk.* 417.) the wife was entitled, before marriage, as a legatee of her father; and the husband assigned all the interest which he was entitled to, in her right to her father's personal estate, to a creditor. But the Chancellor allowed the creditor's claim only on condition of his agreeing to make a separate provision for her and her children.

The doctrine of these cases is, that the husband may assign his wife's *choses in action*, for a valuable consideration, to a creditor; but even then the assignment is subject to her equity for a reasonable provision. (*Vide* the cases of *Pryor* v. *Hill*, 4 *Bro.* 139. *Like* v. *Beresford*, 3 *Vesey*, 506. *S. P.*) Those cases, also, show, that there is no distinction between the case of an interest vesting in the wife before or after coverture; and the inference from them is, (and the position is expressly conceded in other cases, and is well established. *Burnet* v. *Kinnerton*, 2 *Vern.* 40; Lord *Thurlow*, in *Saddington* v. *Kinsman*, 1 *Bro.* 51. note to *P. Wms.* 381.) that a voluntary assignment by the husband of the wife's personal property in action, without consideration, will not bind her, if she survives him. This admission of the right of assignment, for a valuable consideration, so as to pass the right of property free from the wife's contingent right of survivorship, (though not from the wife's equity for a reasonable provision for her support,) and the denying of this effect to a voluntary assignment, were also expressly declared by the Master of the Rolls, in *Mitford* v. *Mitford*. (9 *Vesey*, 87.) He there held, that an assignment in bankruptcy had no greater effect than a voluntary assignment, and he applied the rule to the case of a legacy given to the wife during coverture.

It is to be observed, that we are examining the cases in respect to the question of the wife's right of survivorship, and how far the property has been altered so as to prevent it. We have nothing to do, at present, with the point

which so often appears in the Chancery cases, how far the husband's assignment of the wife's property may affect what is termed the *wife's equity* to a reasonable provision out of the property, for the support of herself and her children. The two questions are not connected, and present very different rules for consideration.

In *Garforth* v. *Bradley*, (2 *Vesey*, 675.) Lord *Hardwicke* discussed more fully the control which the husband had over the wife's personal property lying in action. The wife had a legacy left her during coverture, and part of another legacy came to her by intestacy. The husband assigned over the whole interest, with a proviso, that at his request the assignee should reassign. He died, and the wife survived him, and the question arose between the respective representatives of the husband and of the wife, whether the surplus of her estate arising from the bequest, and the intestacy, survived. There was a settlement in that case, but the Chancellor decided the question arising on the survivorship of the legacy and distributive share, *independent of the settlement*, and upon the general doctrine applicable to the case. He observed, that whenever a *chose in action* came to the wife, whether vesting before or after marriage, it would survive to the wife, if she survived her husband, with this distinction, however, that as to those things which came during coverture, the husband might bring an action in his own name, and might disagree to the interest of his wife; and a recovery in his name was equivalent to reducing it to possession, and it would go to his representatives; and for which point he cited the case of *Hilliard* v. *Hambridge*, (*Alleyn*, 36.) He said further, that the husband might have released the money, or have assigned it for a valuable consideration to a creditor or purchaser. But in that case, as the assignment was not absolute, but with a proviso which created a trust for the benefit of the husband, there was no alteration of the property, as the husband was previously the owner, subject to

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the wife's survivorship. The portion, therefore, of her estate not got in, was held to have survived to the wife.

With respect to a decree, judgment, order, or award, in favour of the husband, as to money to which he was entitled in right of his wife, it seems to be a settled rule, that if he sues alone and recovers, the property vests in him by the recovery, and is so changed as to take away the right of survivorship in the wife, but if the suit was in their joint names, the wife, as survivor, would take the benefit of the recovery. (*Oglander* v. *Baston*, 1 *Vern.* 396. *Nanny* v. *Martin*, 1 *Ch. Cas.* 27. *Heygate* v. *Annesley*, 3 *Bro.* 362. 1 *Fonb.* 305, 306, 308.)

If a husband sues alone for his wife's property, and recovers, the property vests in him, so as to take away the wife's right of survivorship: but if the suit be in their joint names, the wife's right of survivorship remains.

It appears, then, by the cases which we have hitherto noticed, that if the husband appoints an attorney to receive the money, and he receives it, or if he mortgages the property, or assigns it without reservation, and for a valuable consideration, or if he recovers it by a suit in his own name, or if he releases the debt, in all these cases, the right of survivorship in the wife ceases. But with respect to suits in this Court by the husband, for the wife's legacy or distributive share, I apprehend the rule to be that the wife must be made a party. This was considered to be the rule by the Master of the Rolls, in *Langham* v. *Nanny*, (3 *Vesey*, 467.) who observed, that as the husband could not reach his wife's property vested in trustees, who had the legal interest, without application to Chancery, he could not sue without joining her with him; and then the Court would make him provide for her, unless she consented to waive any provision. And again, in *Blount* v. *Bestland*, (5 *Vesey*, 515.) Lord *Loughborough* declared the same thing, and that the husband could not file a bill for the wife's legacy, without making her a party. And in *Carr* v. *Taylor*, (10 *Vesey*, 578.) the wife claimed a distributive share as next of kin to an intestate, who died while she was a *feme covert*; and the Master of the Rolls observed, that "whatever controversy there might have

If the husband sues in this Court, for his wife's legacy, or distributive share, she must be made a party: and then the Court will make him provide for her.

been upon the husband's right to sue in his own name for the *legal choses in action* of his wife, he could not sue for *this fund*, without joining her; and if he had obtained a decree for it in her right, and died before he had reduced it to possession, it would have survived."

The case of *Blount* v. *Bestland* may also be referred to, in order to show that any indulgence given by the husband to the executor holding a legacy for the wife, and even receiving the interest of it, and suffering the principal to remain in the executor's hands, after the executor had showed a readiness to pay it, does not alter the nature of the property, or reduce it to the possession of the husband, so as to take away the right of survivorship to the wife. In *Wildman* v. *Wildman*, (9 *Vesey*, 174.) we have an equally strong instance of protection given to the contingent right of survivorship. The wife, while under coverture, became entitled to a distributive share of personal estate, as next of kin, and which consisted partly in public stock. The administrator transferred her share into her name, and she and her husband had transferred some part of it, and the residue stood in her name at his death. The Master of the Rolls, without giving any opinion whether the husband had a right to have transferred the stock into his own or another name, held that as the husband had not exerted any power to reduce it into possession, the property did not vest in him, so as to prevent the wife from taking it as survivor. A still more striking instance of the scrupulous care over the wife's right, appears in *Baker* v. *Hall*. (12 *Vesey*, 497.) The husband, as executor, took possession of the real and personal estate of the testator, and his wife was a residuary devisee. But as the husband took possession, *in the character of trustee* and executor of the will, and not as husband, the Master of the Rolls held, that the wife's share of the residue of the personal estate could not be deemed sufficiently reduced into possession, so as to prevent its surviving to her upon

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his decease. And it has also been since ruled, (*Wall* v. *Tomlinson*, 16 *Vesey*, 413.) that a transfer of the wife's stock to the husband, *merely as a trustee*, was not a reduction into possession, so as to bar her right of survivorship, for it was made *diverso intuitu*.

Under the doctrine settled in these cases, there is no pretence for the suggestion, that the distributive share of *Mrs. Schuyler*, which remained in the hands of *N. J. V.* the administrator of the intestate, at the time of the death of *S.*, was reduced into the possession of *S.*, so as to entitle his representatives to that share in preference to his widow. While the share remained in the possession of the administrator, it retained the character of assets, and the legal title and possession were in him, *qua* administrator. The distributive share continued in the possession of the administrator as much as the legacy continued in the possession of the executor, in *Blount* v. *Bestland*. *Schuyler* had not attempted to exercise any authority or dominion over that property, by mortgaging it, or assigning it. The letter of attorney authorizing *N. J. V.* to take out letters of administration, and to distribute the shares coming to the heirs, was a power executed by the husband and wife *jointly*, and the direction to pay over was a direction to pay to them *jointly* the share of the wife. If the administrator was to have been compelled by suit to distribute, it must have been by a suit in equity in their joint names; and from what was said in *Campbell* v. *French*, (3 *Vesey*, 321.) it may be questioned whether the Court would not have required, under the circumstances of this case, the consent of the wife, before it required the administrator to pay to the husband alone. There is nothing in this case to show that the husband ever *intended*, by any act of his, to appropriate this share to himself, so as to cut off his wife's contingent right of survivorship. We should act in contradiction to the whole course of the decisions, as well as to the truth of the fact, if we were to consider

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the share of the wife, before it passed out of the hands of the administrator, as being reduced to the husband's possession. The husband died before he or his attorney received the share now in question, and before he had exercised any authority or dominion over it.

I am, accordingly, of opinion, that the defendant, *Sally H.*, upon the death of her husband *S.*, became entitled, in her own right, to that portion of her distributive share which had not been actually paid over to *S.* or to *Bleecker* his attorney, in his life time; and I shall so declare the rule.

Decree accordingly.

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MILLS *against* COMSTOCK.

M., in 1807, to secure a debt, executed a mortgage of land, of which he was seized in fee, to *H.* In *March*, 1808, *M.* executed a conveyance of the same land, in fee, to *H.*, by an absolute deed, with full covenants, which was duly recorded in *April* following. *H.* gave *M.* a bond, dated *June* 7, 1808, conditioned that if *M.* paid *H.* 400 dollars, on the 1st of *December*, 1809, he would reconvey the land to *M.*, subject to the mortgage; but this bond or defeasance was never recorded; and the conveyance of the equity of redemption from *M.* to *H.*, appeared on record as an absolute deed. On the 1st of *May*, 1809, *H.* sold and assigned over the bond and mortgage to the defendant. On the 11th of *October*, 1816, *H.* sold and conveyed the premises, by a deed in fee, with full covenants and warranty, to the plaintiff, who was a *bona fide* purchaser, for a valuable consideration, without notice of the bond or defeasance from *H.* to *M.*, or of the assignment of the bond and mortgage from *H.* to the defendant: *Held*, that the bond or defeasance from *H.* to *M.* not having been registered, the conveyance of the equity of redemption by *M.* to *H.* was to be deemed, in regard to third persons, as an absolute deed; and the legal and equitable title being united in *H.*, the latter was merged in the former: and that the bond or defeasance from *H.* to *M.*, and the assignment of the bond and mortgage from *H.* to the defendant, were fraudulent and void, as against the plaintiff.

March 27, and *April* 30.

THE bill, filed *April* 2, 1817, stated, that the plaintiff, on the 11th of *October*, 1816, purchased of *Benjamin Herrick* a farm, in *Homer*, in the county of *Cortlandt*, for which he paid him 4,000 dollars; and received of him a deed of conveyance, of that date, duly executed, with the usual covenants and warranty; which deed was duly recorded in *Cortlandt* county, on the 24th of *October*, 1816. That *H.* at the time of the purchase and sale, represented himself as seized of the premises, and that they were free from all incumbrances: that the plaintiff gave credit to those assurances, and made the purchase without notice of any incumbrances. That on the 15th of *March*, 1817, the plaintiff first had no-

tice that the farm was advertised for sale, under a power contained in a mortgage, dated *November* 28, 1807, executed by *Abraham Miller* and his wife to *Nathan Conkling* and *Benjamin Herrick, jun.* The bill charged, that before *November*, 1807, *A. Miller* was seized of the premises, and that if he executed a bond, and the mortgage above mentioned, the consideration thereof was furnished from the joint interest and copartnership funds of *Conkling & Herrick.* That *M.* afterwards came to an agreement with *H.*, who acted for *C.* and himself, that *H.* should pay to *M.* the further sum of 300 dollars; and in consideration thereof, and in discharge and satisfaction of the mortgage, *M.* agreed to give his deed in fee for the premises, to *H.*; and that *M.* accordingly did, on the 7th of *March*, 1808, execute and deliver to *H.*, a deed in fee for the premises, with full covenants and warranty, and the consideration expressed was $300 which *H.* paid, and received the deed as an accord and satisfaction of the mortgage, and it was so accepted; and that thereby the mortgage became merged, satisfied, and discharged, and was no longer a lien on the premises, against the plaintiff, as a *bona fide* purchaser, without notice. That soon after, *Conkling* and *H.* came to an adjustment of their joint interest in the farm, and *H.* paid or secured to *C.* about 900 dollars, and *C.* released to *H.* all his right and interest in the bond and mortgage and farm, by deed, dated *September* 7, 1808, which release has since come into the power or possession of the defendant. That the defendant pretends that *C.* on the 17th of *September*, 1808, assigned his interest in the bond and mortgage to *H.*, who assigned the same, on the 1st of *May*, 1809, to the defendant for a valuable consideration. That the defendant knew that the mortgage was invalid, and the assignment was without consideration, and given for usurious purposes, and that the mortgage was satisfied before the assignment to the defendant. That the assignment was not recorded before the plaintiff purchased the farm. That *H.* has paid large sums to the defendant, and that but

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a small part of the money, for which the assignment was given as collateral security, remained due. The bill *prayed*, that the plaintiff might be protected in his possession and title, discharged of the mortgage, and that the mortgage might be cancelled of record, and, with the assignment, be delivered up to the plaintiff; and that the defendant be enjoined from proceeding to sell under the mortgage, and from disturbing the plaintiff in his possession, and for general relief, &c.

The *answer* of the defendant admitted the seisin of *Miller*, and that being indebted to *C.* and *H.* in the sum of 2,366 dollars, he did, on the 28th of *November*, 1807, execute to them a bond for that sum, payable *December* 1, 1809, and a mortgage of the land in *Homer*, which was duly registered *December* 19, 1807. That on the 17th of *September*, 1808, *C.*, by deed, sold and assigned to *H.*, for the consideration of 2,266 dollars, all his right and interest in the said bond and mortgage. That *H.* offered to assign the bond and mortgage to the defendant for *Dutchess* turnpike stock, representing the bond and mortgage to be valid and unpaid: and on the 1st of *May*, 1809, the defendant assigned to *H.* such turnpike stock, and *H.*, by deed, in consideration of 2,274 dollars and 28 cents, assigned the bond and mortgage to the defendant, with a covenant by the defendant, that he should not enforce payment of the principal in five years; and *H.* covenanted that the interest should be paid annually, by *M.* the mortgagor, or by *H.*, and that at the end of the five years, the principal should be paid by the mortgagor or by *H.*: and it was further covenanted, that if, at the end of five years, *H.* should pay the amount of the mortgage debt and interest, the right and interest so assigned by *H.*, should cease. The defendant averred, that when he took the assignment, he had no knowledge of any interest or title of *H.* in the premises, other than as mortgagee; nor did *H.* pretend to any other. That *H.* delivered to the defendant the bond

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and mortgage, with the assignment, but the latter was not recorded. That the transaction was *bona fide*, and not usurious. That *H.*, at divers times, from 1810 to 1815, paid the defendant interest on the bond and mortgage, which payments were regularly endorsed on the assignment; that no other payments had been made by *H.* or the mortgagor. That in 1816, the interest being unpaid, the defendant advertised the premises for sale, under the power contained in the mortgage. The defendant admitted that *H.* conveyed some right or interest in the mortgaged premises to the plaintiff; and that the plaintiff had taken possession, and made some improvements. But he denied that the mortgagor, for the consideration of 300 dollars, and in satisfaction and discharge of the mortgage, did, on the 7th of *March*, 1808, give a deed in fee to *H.*, or that *H.* paid *M.* the 300 dollars, and received a deed in fee, in accord and satisfaction of the mortgage, as the plaintiff had alleged. He admitted that the mortgagor, on the 7th of *March*, 1808, applied to *H.* for goods on a credit; and that *H.* agreed to let him have goods to the amount of 300 dollars, on the security of the mortgaged premises, and to give him time for payment to the 1st of *December*, 1809; and that the mortgagor did execute and deliver to *H.* an absolute deed, with full covenants, under the assurance that he should have time to redeem, as above mentioned: that the deed was recorded by *H.* as an absolute deed, on the 22d of *April*, 1808; and that *H.* gave to the mortgagor a writing or bond for 400 dollars, conditioned that if the mortgagor paid to *H.*, on the 1st of *December*, 1809, 400 dollars, with interest, he was to reconvey, or execute a good and sufficient deed to the mortgagor, except the incumbrance, &c. and the bond then to be void, &c.

Proofs were taken by both parties; and the cause came on to be heard, on the 27th of *March*.

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J. Tallmadge, for the plaintiff, stated the following points: 1. That the mortgage to *C.* and *H.*, now held by the defendant, was merged and satisfied in the legal estate acquired by the subsequent deed from the mortgagor to *H.*

2. That the neglect of the defendant to record the assignment of the mortgage to him, has been the means of fraud, and ought not to prejudice the plaintiff, who is a *bona fide* purchaser, without notice.

3. That the deed from *M.* to *H.* was an absolute deed; it was for an entire new consideration; and there was no provision for the repayment of the money or interest.

4. The agreement between *M.* and *H.* was not collateral to the deed; but for a repurchase, and is, by the terms of it, void, for want of performance on the part of *H.*

5. That even if the parties have equal equity, the plaintiff having the legal title, is to be preferred.

6. That the transaction between *H.* and the defendant was usurious.

7. That *M.* was excluded, by his own acts, from claiming any title in the land.

8. That *Miller* was not an admissible witness, to destroy his own deed, and open the right of redemption.

He cited, 2 *Caines' Cases in Error*, 124, 132. 2 *Cruise's Dig. tit. Mortgage, tit.* 15. *ch.* 1 *sect.* 32. *Cas. Temp. Talbot*, 61. *Powell on Mort.* 28. 30. 34. 40. 1 *P. Wms.* 268. 1 *N. L. R.* 373. 3 *Johns. Ch. Rep.* 58. 18 *Vesey*, 384. 1 *Vernon*, 271. *Powell on Mort.* 281. 282. 194. 195. *Sugden's Law of Vendors*, 489. 493. 2 *Vernon*, 370. 554. 1 *P. Wms.* 394.

Oakley, contra, made the following points: 1. That *B. Herrick's testimony* ought to have been rejected on the ground of interest.

2. That the transactions between *H.* and the defendant were not usurious

3. That the conveyance from *Miller* to *H.* was intended merely as a security for goods sold; and that when the defeasance was given, it became, emphatically, a mortgage.

4. That there was no merger of the first mortgage, as was pretended, because it was not so intended, and because it would be an act inconsistent with the second transaction.

5. That there was no evidence in the case, that the plaintiff had paid *H.* the consideration money, *before* he had actual notice of the existence of the mortgage in the hand of the defendant.

6. That if the parties had equal equity, the Court would leave them to their remedies at law.

He cited, 2 *Atk.* 631. 3 *Atk.* 304. *Sugden's Law of Vend.* 487. 1 *N. R. L.* 510.

THE CHANCELLOR. The plaintiff appears in the character of a *bona fide* purchaser, for a valuable consideration, without notice that the mortgage set up by the defendant was outstanding and subsisting. On the contrary, he had notice, by means of the *Onondaga* records, that the equity of redemption of *Miller*, the mortgagor, had been released to *Herrick*, from whom he purchased. *April 30th.*

The short state of the case is, that *Miller*, the owner of the land, gave a mortgage of it to *Conklin* and *Herrick*, on the 28th of *November*, 1807, to secure the payment of a bond, and that mortgage was forthwith duly registered. The bond was payable on the 1st of *December*, 1809. On the 7th of *March*, 1808, *Miller* conveyed the same land to *Herrick*, by an absolute deed, in fee, with full covenants of title; and the deed was duly recorded in *April* following. On the 7th of *June*, 1808, *Herrick* gave *Miller* a bond, with a condition, that if *Miller* paid him 400 dollars, on the 1st of *December*, 1809, he was to reconvey the land to *Miller*, subject to the mortgage, but this bond or defeasance was never registered, and the conveyance from *Miller* to *Herrick*

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of the equity of redemption stood upon record as an absolute deed. *Conklin's* interest in the bond and mortgage was assigned to *Herrick*, on the 17th *September*, 1808. On the 1st of *May*, 1809, *Herrick* assigned over the bond and mortgage to the defendant, who now claims to hold the mortgage, as a valid and subsisting incumbrance, in opposition to the subsequent purchase by the plaintiff, from *Herrick*.

In the first place, it was the duty of one of the parties to the conveyance of the equity of redemption from *Miller* and *Herrick*, to have had the defeasance created by the bond of the 7th of *June*, 1808, registered, so as to give notice of the real character of the deed of the 7th of *March*, 1808. (*Laws, vol.* 1 373. *sec.* 3.) It had been put upon record, as an absolute deed, and there was nothing to gainsay it, and every person dealing with *Herrick*, had a right to presume, and was chargeable with notice, that *Herrick* was the absolute owner, and that *Miller* had parted with his equitable title by this last deed, as he had already parted with his legal title by the mortgage. The legal and equitable titles had united in *Herrick*, and the latter had, of course, merged in the former. This was the language of the official notice of the record, and when the defendant afterwards, on the 1st of *May*, 1809, took from *Herrick*, an assignment of *Miller's* bond and mortgage, he took no better title than *Herrick* himself had in the character of an original mortgagee, and he was chargeable with notice of the release by *Miller*, of the equity of redemption. *Herrick* was no longer mortgagee, but a purchaser of the whole interest of *Miller;* and whatever conveyance *H.* afterwards made of his interest in the premises, that conveyance ought to have been recorded, in order to protect the party against subsequent *bona fide* purchasers from *H.* But the defendant did not record the deed of assignment, and the subsequent purchaser from *H.* had no means of knowing that the

mortgage was still regarded as subsisting; and *Miller*, by omitting to record his deed of defeasance, and the defendant, by omitting to record his deed of assignment, lost their titles under those instruments, as against subsequent purchasers. If this were not the case, then they would have enabled *Herrick*, by their negligence, to commit a fraud upon *bona fide* purchasers, and the verity of the records and the language of the recording act, would prove a snare to the unwary. But the words of the statute are too strong to admit of any such abuse or evasion: "All deeds and conveyances of or concerning, or whereby any of the military bounty lands may be any way affected in law or equity, shall be recorded, &c. and every such deed and conveyance shall be adjudged fraudulent and void against any subsequent purchasers or mortgagee for valuable consideration, unless recorded, &c. before the recording the deed or conveyance under which such subsequent purchaser or mortgagee should claim." (*Laws N. Y. sess.* 17. *ch.* 1. *sec.* 1.)

There were provisions in the deed of assignment of the mortgage to the defendant which, connected with the subsequent acts of *H.* and the defendant, are sufficient to create an inference that the assignment was intended to be concealed. I have no doubt that intention existed on the part of *Herrick*, and the defendant seems to have lent his sanction to it, by the very form of the assignment, which he accepted. The mortgage was to secure a bond payable on the 1st of *December*, 1809; yet it was agreed between *H.* and the defendant, that the latter was not to enforce payment, until the expiration of five years, and *H.* covenanted, that he would see that the interest was annually paid; for he agreed, that the interest should be paid by the mortgagor, *or by him*, and that if at the expiration of the five years, he, *Herrick*, should pay the principal, the right so assigned should cease. If this assignment was intended as a fair and absolute transfer of the bond and mortgage, the ordinary course would have been to have left *Miller*, the mortgagor, to pay the debt and

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interest, as they became due, according to the tenor of the bond. Instead of this, *H.* officiously assumes the payment upon himself, and the defendant accepts of his covenant upon an agreement, without consulting *Miller*, to give nearly five years of extended time, beyond the terms of the bond. The parties contracted with each other as if *H.* and not *Miller*, was the debtor, and was to be exclusively charged with the payment of the bond; and in pursuance of this agreement, it appears, that the annual interest, down to *May*, 1815, was actually paid by *H.* There does not seem to have been any communication between the defendant and *Miller*, and it has very much the appearance of a combination between the defendant and *H.* to keep the claim under the mortgage from the knowledge of the mortgagor himself. Its tendency was to enable *H.* to appear to the world as the absolute owner, and to deal with the public as the real owner, which he effectually did by the deed to *Pugsley*, in 1810, and by the coercion of a release of dower from *Miller's* wife, in the same year, and by the sale to the plaintiff, in 1816. When *Miller* attested the deed to *Pugsley*, in 1810, he must have considered *H.* as the absolute owner, or he was knowingly auxiliary to a fraud.

Under the circumstances of the case, I consider the plaintiff entitled to hold the land discharged of the pretended incumbrance set up by the defendant; and that if the assignment of the mortgage to the defendant was not void on the ground of fraud, (which I much incline to believe,) yet that as the defeasance to the deed from *Miller*, and as the assignment of the mortgage to the defendant, were neither of them recorded, the plaintiff is entitled to protection, under the statute, as a *bona fide* purchaser for a valuable consideration. There is no notice, either actual or constructive, with which he is to be charged.

I shall, accordingly ,decree, that the defendant be perpetually enjoined from prosecuting or from selling under the

mortgage. I have had some difficulty on the question of costs; but as the defendant declares, in his answer, that when he took the assignment of the bond and mortgage, he had no knowledge of any interest or title in *H.*, other than as mortgagee, and as there is no direct proof sufficient to countervail this averment in the answer, I have not thought the case quite strong enough to charge him with the costs of this suit.

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Decree accordingly.

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WADSWORTH v. WENDELL.

WADSWORTH *against* WENDELL and others.

A defective conveyance by a person seized in fee at the time, is good, so as to bind the lands conveyed, in the hands of the grantor and his heirs. It is good, also, against a subsequent purchaser with notice of such prior defective conveyance.

As, where a soldier entitled to military bounty lands, under the several acts of the legislature, by an instrument in writing purporting to be under his hand and seal, but to which no seal was, in fact, affixed, for a valuable consideration, sold, quit-claimed, and confirmed to the plaintiff, his heirs, and assigns for ever, all his right, title, claim, and demand to and for all the land to which he was entitled as a soldier, &c. with covenant for further assurance; no patent having then issued for the land: which instrument of conveyance was duly deposited in the office of the Clerk of the county of *Onondaga*, on the 29th of *April*, 1795, pursuant to the act of the 8th of *January*, 1794, and afterwards, on the 8th of *March*, 1799, duly proved: and the same grantor, on the 25th of *October*, 1796, executed a deed in fee for the same land to *P.*, under whom the defendants claimed title: *Held*, that although the first instrument, for want of a seal, was defective as a *legal* conveyance, yet it passed all the right and interest of the grantor in *equity*, the omission of the seal being a mistake, contrary to the express intention of the parties: that the deposit of the instrument in the clerk's office, pursuant to the act of the 8th of *January*, 1794, was legal notice to all subsequent purchasers of its contents, and equivalent, in that respect, to a registry of it: and that *P.* and those claiming under him were chargeable with *notice* of the prior conveyance to the plaintiff; and the defendants were, accordingly, decreed to release to the plaintiff all the right and title derived to them under *P.*

April 9th, and May 3d.

THE bill, (filed *May* 29th, 1817,) stated that *John Thomas* was a soldier in the Second *New-York* Regiment, during the revolutionary war, and entitled to a grant from the state of 600 acres of land. That letters patent were issued to him on the 9th of *July*, 1790, for No. 11 in the township of *Solon*. That on the 5th of *September*, 1789, *J. T.* the soldier, for a valuable consideration, sold all

his right, title, and demand to his military bounty lands, to the plaintiff, in fee, and covenanted to make further assurance. This instrument of transfer concluded in these words: "In witness whereof, I have hereunto set my hand and seal," &c.; but there was no seal affixed to it. The instrument was deposited, on the 29th of *April*, 1795, in the office of the Clerk of the county of *Onondaga*, and was duly proved on the 28th of *March*, 1799. That *J. T.* died intestate; and the defendants who are in possession of the lot, claim title to it, under a conveyance from the soldier, as they allege; but which conveyance, if any there was, the plaintiff averred to have been given subsequent to the instrument so deposited in the Clerk's office, and with legal notice of it. That about four or five years since, the plaintiff brought an action of ejectment against the defendants, to recover possession of the lot; and the action was tried in 1814, and a verdict found for the plaintiff; but the Supreme Court, on a case made by the parties, decided, in *October*, 1815, that the instrument so deposited by the plaintiff, not being under seal, was not sufficient to convey the legal estate, and gave judgment for the defendants. (*Vide* 12 *Johns. Rep.* 355.) *Prayer* for general relief.

The defendants, in their *answer*, admitted that the defendant *John Matthews*, and three tenants under him, were in possession of the lot in question, by permission of the other two defendants. They stated that the lot was devised to the defendants by *David Matthews*, of *Vermont*, in fee, in *trust*, for the children, by name, of *D. M.*, now deceased. That *D. M.* the testator, derived his title under a patent, dated *July* 9th, 1790, to *John Thomas*, for the lot in question, a deed from *J. T.* to *William Preston*, in fee, dated 25th *October*, 1796, for the consideration of 400 dollars, acknowledged the same day, and recorded the 15th of *February*, 1797, and a deed from *W. P.* to *D. M.* dated the 29th of *August*, 1797, in fee, for the consideration

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of 1000 dollars, for the same lot, excepting 50 acres, in the S. E. corner of the lot, sold by the Surveyor General. That *D. M.* the testator, died the 29th of *March*, 1811, and the defendant *J. M.* is his son. That *J. M.* paid, *bona fide*, 750 dollars to *W. P.* for his interest in the lot. That in 1798, or 1799, *Levi White* went into possession of the lot under *D. M.*, and possession has been held under that title, until the present suit. That improvements have been made on the lot to the value of 3000 dollars. That *D. M.* when he purchased, had no knowledge of the deed to the plaintiff, or of his claim. That in 1799, the defendant *Morris*, the son in law of *D. M.*, went into possession of a part of the lot, and continued in possession four years, and never heard any thing of any adverse claim, until 1800. The defendants admit that an action of ejectment was brought, and the proceedings and judgment, as stated in the bill.

The instrument of conveyance under which the plaintiff claimed, was made an *exhibit* in the cause, the granting part of which was in these words: "I, *John Thomas*, of *New-Haven*, in the state of *Connecticut*, corporal in the Second or *New-York* Artillery Regiment, in the service of the *United States of America*, for and in consideration of a valuable sum received to my full satisfaction, before the sealing and delivery of these presents, of *James Wadsworth*, jun. of *Durham* in *Connecticut*, have sold, quit-claimed, and confirmed to the said *James Wadsworth*, jun., his heirs and assigns for ever, all the right, title, claim, and demand, which I or my heirs or assigns may have, at any time hereafter, to all the land and lands which I or either of them may hereafter be entitled to, from the State of *New-York*, or from the Congress of the *United States* of *America*, for my services as corporal in the Second or *New York* Regiment of Artillery, in the army of the *United States of America*, for during the war with *Great Britain*, and to every part and parcel thereof." The residue of the in-

strument contained covenants on the part of the grantor to ensure the title, and concluded, "In witness whereof, I have hereunto set my hand and seal," &c.

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April 9th. The cause was this day brought to a hearing on the pleadings and proofs.

Van Vechten, for the plaintiff. He cited, 10 *Johns. Rep.* 497. 2 *N. R. L. K. & R's Ed.* 262. 1 *N. R. L.* 209. 1 *Caines' Rep.* 82.

Henry, contra. He cited, 12 *Johns. Rep.* 355. 8 *Johns. Rep.* 141. 3 *Johns. Rep.* 388. 424. 2 *Johns. Ch. Rep.* 190.

THE CHANCELLOR. The plaintiff sets up an equitable right to lot No. 11, in *Solon*, in the county of *Cortlandt*. The original patentee was *John Thomas*, a soldier in the *New-York* regiment of artillery, in the revolutionary war; and the patent to him for the lot was dated *July* 9th, 1790. His right commenced with the concurrent resolution of the legislature, of the 27th of *March*, 1783, and was confirmed by subsequent acts of the legislature. The act of the 11th of *May*, 1784, directed letters patent to issue to the officers and soldiers entitled under the concurrent resolution of 1783, and that the military bounty lands be laid out in the manner therein prescribed. The act of the 28th of *February*, 1789, directed the commissioners of the land office to lay out these lands into townships, and the townships into lots, and then to proceed to ballot for each soldier's lot. In this inchoate state of the military rights, the above patentee, on the 5th of *September*, 1789, (having then an equitable right, but no legal title,) sold, quit-claimed, and confirmed all his "right, title, claim, and demand," to the said lands, to the plaintiff, by a conveyance, purporting to be a deed in fee, and to be given for a valuable consideration, but which had no seal affixed to it. After this conveyance, the act of 6th *April*,

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1790, was passed, giving letters patent for the military bounty lands, an operation as and from the 27th of *March*, 1783, so as to be deemed to have vested a title in the grantees from that time; and it declared that "all grants, bargains, sales, devises, or other dispositions," made by the grantees, or their heirs or assigns, of the said lands so to be granted, between the 27th of *March*, 1783, and the date of the letters patent, should be good and effectual, as if the letters patent had been granted on the 27th of *March*, 1783.

Thomas, the soldier, is then to be deemed, by the force of this last statute, to have been legally seized of the lot in question, when he sold to the plaintiff, by an instrument intended to be valid, but by mistake or ignorance, not competent to convey an estate in fee, at law, according to the decisions of the Supreme Court. The conveyance, however, was equally valid as if the soldier had been seized in fee at the time of making it; and though it be a defective conveyance, for want of a seal, yet it created such an equity as to bind the lands in the hands of the soldier and of his heirs. The only point in the case is, whether subsequent *purchasers* from *Thomas* were also bound by that equity, in consequence of the deposit of that conveyance, under the acts of 8th of *January*, 1794, and 27th of *March*, 1794.

I think it is a clear point, that *Thomas* was bound by the conveyance to the plaintiff, and that it passed all *his* right and interest in equity. It was not intended to be an agreement only to convey, but an actual present conveyance of all his right and title; and, in equity, it did pass it. The omission to affix a seal, was a mere mistake, contrary to the intention of the parties; for the instrument concluded with these words: "In witness whereof, I have hereunto set my hand and seal." It also contained a covenant, for further assurance, and that he would *at any time thereafter, at the request, cost, and charges of the plaintiff, his heirs and assigns, make, seal, and execute any reasonable act, convey-*

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ance, and assurance in the law, for the perfect granting, quit-claiming, and confirming all his right, title, and demand to the lands aforesaid. *Thomas* and his heirs could have been compelled to have executed a more perfect conveyance, and one competent to have passed the legal title to the plaintiff. But he, afterwards, in 1796, conveyed his legal title, by a deed in fee, to *Preston*, under whom the defendants claim; and the question is, whether *Preston*, and all holding under him, were not chargeable with notice of the equity of the plaintiff.

The act of 8th of *January*, 1794, directed, "that all deeds and conveyances heretofore made and executed, or pretended so to be, of and concerning, or whereby any of the said lands might be any way affected in law or equity, should, on or before the 1st of *May*, 1794, be deposited in the clerk's office, &c. and if not, that they should be adjudged fraudulent and void, against any subsequent purchaser or mortgagee, for a valuable consideration; and all deeds and conveyances thereafter to be made, were to be recorded, or to be adjudged fraudulent and void, against any subsequent purchaser or mortgagee, for a valuable consideration, whose deed should be first recorded," &c. The time for depositing the deeds was afterwards prolonged to the 1st of *May*, 1795, and it appears in proof, that the conveyance to the plaintiff was duly deposited, in pursuance of the act, on the 27th of *April*, 1795, and was afterwards duly proved, on the 8th of *March*, 1799, and the identity of the soldier is perfectly ascertained.

A deposit of a conveyance of military bounty land, pursuant to the act of the 8th of *January*, 1794, was equivalent to a record, and operated as a notice to subsequent purchasers.

The deposit of these conveyances was intended by the legislature to be notice to all subsequent purchasers of their existence and contents, and the deposit of them would have been, in a degree, useless, if it was not intended to operate as notice. The deposit, as to all deeds and conveyances made prior to the act, was intended as a substitute for the prior registry of them, and to be from the date of the deposit, equiva-

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lent to the recording of them. It was the policy of that statute to place all the military titles upon record, and by another revision in it, all future conveyances of any of these lands were to have priority, according to the registry of them. The words of the act were comprehensive enough to embrace the case of the plaintiff's conveyance, for it reached to every instrument of or concerning these lands, and whereby these lands might be affected, in law or equity. Deeds and conveyances, any way affecting the title prior to that day, were to be deposited, and deeds and conveyances thereafter were to be recorded; and the omission to deposit in the one case, and the omission to record in the other, equally avoided the conveyance as against subsequent purchasers, without notice, whose deeds were first recorded. There was no space of time left, in which the files and records in the clerk's office were not to contain the test of the title; and I cannot entertain a doubt, that the deposit was intended to be, and was, in judgment of law, as effectual notice to purchasers in the one case, as the record of subsequent deeds was notice in the other. It is settled, (*Johnson* v. *Stagg*, 2 *Johns. Rep.* 510. *Frost* v. *Beekman*, 1 *Johns. Ch. Rep.* 298. *Parkist* v. *Alexander*, *ib.* 389.) that the registry of a mortgage under the mortgage act, is notice to all subsequent purchasers and mortgagees; and the same construction ought to be given to the act above referred to, for the case is within the same reason and policy.

A defective conveyance binds the lands, in equity, against the heirs of the grantor.

When, therefore, *Preston* purchased of *Thomas*, and when *Matthews* purchased of him, they were each of them chargeable with notice of the conveyance of *Thomas* to the plaintiff, and of its contents. They, therefore, took, subject to that equity, equally with *Thomas* himself, or with his heirs; and in the words of Ch. B. *Eyre*, in *Morse* v. *Faulkner*, (1 *Anst.* 14.) "It is clear, that where there is an agreement to convey, or a defective conveyance by a person then actually having title, that would be such an equity as would bind the lands in the hands of the heir." So, a defective con-

veyance has been held good against a subsequent voluntary grantee. (*Martin* v. *Seamore*, 1 *Ch. Cas.* 170.) But what is more to the point, a defective conveyance of copyhold, which was void in law for want of being presented in due time, was made good against a subsequent purchaser, with notice of the prior defective surrender, and the subsequent purchaser was decreed to pay the debt which the defective surrender was intended to secure, by way of mortgage, or else to surrender the legal estate. (*Jennings* v. *Moore*, 2 *Vern.* 609.) Assuming the subsequent purchasers in the present case under *Thomas*, to have had notice of the conveyance to the plaintiff, that case is in point; and it was decided by Lord Chancellor *Cowper*, in 1708. We find a similar decision a century afterwards, in the recent case of *Daniels* v. *Davison*. (17 *Vesey*, 433.) In this latter case, Lord *Eldon* decreed specific performance of a contract against a subsequent purchaser, with notice of the equitable title of the plaintiff. He was charged only with constructive notice, and was to be considered as a purchaser, subject to the plaintiff's equity; and such a conveyance from the purchaser was decreed, as the master should settle. In short, the doctrine is too well established, and is too just, in itself, to admit of any doubt: and it being entirely clear that the equitable title was in the plaintiff when *Preston* purchased of the soldier, and that the deposited conveyance was, by the force and operation of the statute, notice of its contents to every subsequent purchaser, it follows, as a necessary consequence, that the plaintiff is entitled to a conveyance from the defendants of all the right and title to the lot which they held as trustees, under the will of *David Matthews*.

Specific performance decreed of a contract against a subsequent purchaser, with notice of the plaintiff's equitable right.

I shall, accordingly, decree, that the defendants, within forty days after the service of a copy of the decree, release and convey to the plaintiff, in fee, all the right and title derived to them as trustees under the will of *David Matthews*, deceased, to the said lot No. 11, in *Solon*, by a

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proper and valid deed in law, to convey such right and title, the form of which is to be settled by a master, at joint expense, if the parties or their counsel cannot otherwise agree upon the same; and that no costs of this suit be charged by either party as against the other.

Decree accordingly.

GREGORY and WITHERS, *Overseers of the Poor* of the town of *Sand Lake*,

against

REEVE and HULL, *Overseers of the Poor* of the town of *Berlin*.

On a bill filed by the overseers of the poor of the town of *S.* against the overseers of the poor of the town of *B.*, for relief, on the ground of fraud, alleged to have been committed by a former overseer of the poor of *B.*, upon the former overseers to the poor of *S.*, in the apportionment of the money and poor belonging of *B.*, pursuant to the provision of an act for the division of that and another town into three towns: *Held*, that this Court could not give relief for or against the parties, in their individual capacities; and that the remedy, if any, between the two towns, was at law.

Where a demurrer to the plaintiff's bill is allowed, on the ground that the relief, if any, is at law, the defendant is entitled to his taxable costs.

April 17th and May 4th.

THE bill charged, that at a meeting of the supervisors and the overseers of the poor of the towns of *Sand Lake* and *Berlin* on the 13th of *May*, 1813, for the purpose of apportioning the money and the poor belonging to the town of *B.*, between the two towns of *B.* and *S.*, pursuant to the second section of the "Act to divide the towns of *Greenbush* and *Berlin* in the county of *Rensselaer* into three towns," passed *June* 19th, 1812, (*sess.* 35 *ch.* 204.) the overseers of the poor of *Berlin*,

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by fraudulent misrepresentations caused the supervisor and overseers of the poor of *Sand Lake* to enter into an agreement in writing with the supervisor and overseers of the poor of *B.*, by which the said town of *S.* was charged with an undue proportion of the burden in respect to the poor, &c. The bill *prayed* for relief, and that the overseers of the poor of *B.* might be decreed to refund and pay to the overseers of the poor of *S.*, the plaintiffs, what would have been, and would still be, their due proportion of expense, on a just and fair apportionment of the said poor.

The defendants demurred to the bill, on the ground that the plaintiffs had no title, either in their individual or corporate capacity, to sue the defendants; and that the plaintiffs had not shown a case, entitling them to discovery or relief.

Henry, for the defendants, in support of the demurrer, cited *Coop. Equ. Pl.* 164. 193. 6 *Vesey*, 773. 777. 13 *Johns. Rep.* 496. 16 *Johns. Rep.* 8. 2 *Johns. Ch. Rep.* 371. 384. 389. *April 17th.*

Van Veehten, contra. He cited, *Overseers of Pittstown* v. *Overseers of Plattsburgh*, 18 *Johns. Rep.* 407.

THE CHANCELLOR said, that he did not consider that he could give relief under the bill, for or against the parties, in their individual capacities; and that if there was any remedy, as between the two towns, it was at law, by *mandamus*, *certiorari*, or personal action. The following decretal order was then entered: "It is *declared*, &c. that the remedy (if any) by the present overseers of the poor of the town of *Sand Lake*, against the present overseers of the poor of the town of *Berlin*, for an alleged fraud committed by a former overseer of the poor of the town of *Berlin*, upon a former supervisor and overseers of the poor of the town of *Sand Lake*, in the apportionment of the money and poor belonging to the *May 4th*

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town of *Berlin*, under the provisions of the act entitled, "An act" &c. passed the 19th of June, 1812, appertains to a Court of Law, and not to this Court. It is, therefore, *Ordered*, &c. that the plaintiffs' bill be dismissed, without costs to be taxed by either party, as against the other."

July 6th. The cause was this day re-heard, by consent, on the question of *costs*.

Henry, for the defendants, cited 2 *Madd. Ch.* 415, 416. 2 *Atk.* 113. 11 *Vesey*, 462. 18 *Vesey*, 16. 4 *Bro. C. C.* 545. 1 *Vesey*, 582.

Van Vechten, for the plaintiffs, cited 1 *Johns. Ch. Rep.* 166. and the cases there cited. 1 *Johns. Ch. Rep.* 566. 2 *Johns. Ch. Rep.* 65. 129. 520. 274. 317. 3 *Johns. Ch. Rep.* 477.

THE CHANCELLOR said, he should allow the defendant his taxable costs, on the strength of the authorities of *Holbrooke* v. *Cracraft*, (6 *Vesey*, 706. *note*,) the *anonymous* case in 9 *Vesey*, 221. and the *English* rule of Lord Keeper *Wright*, in 1710. (*Beames' Orders, p.* 320.) That it appeared from these cases, to be the *English* practice, to allow the defendant his costs, when he prevailed by the allowance of the demurrer; and that practice was followed in *Davoue* v. *Fanning*. (4 *Johns. Ch. Rep.* 199.) The former decree was varied accordingly, in respect to costs.

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T. CLOWES *against* DICKENSON and others.

The plaintiff purchased two lots of land of *V.*, against whom there was an existing judgment. All the real estate of *V.* (the residue of which was more than sufficient to satisfy the judgment) was sold, subject to all incumbrances, under a subsequent judgment, to the defendant, who, afterwards, took an assignment of the prior judgment, and issued execution thereon, under which the two lots of the plaintiff were sold, and purchased by the defendant, who made improvements, and sold one of the lots: *Held*, that though the Court would have interposed and prevented the sale of the plaintiffs' lots, if he had applied in due season, for that purpose; yet, as he knew of the sale, at the time, and delayed four years, before he filed a bill for relief, the Court refused to disturb the sale, or to direct a reconveyance of the lots to him; but the defendant was ordered to pay the plaintiff, as an equitable indemnity, under the circumstances of the case, the sum for which the lots were sold, with interest from the time.

A judgment creditor is not entitled, in equity, to enforce the payment of the judgment against the land of a subsequent purchaser, as long as there is sufficient property of the debtor remaining unsold, to satisfy the judgment. And the creditor, in such case, is entitled to resort to the land of the purchaser, to the extent only of his debt, which may remain unpaid after the estate of the debtor has been exhausted.

So, if *A.* against whom there is a judgment, being seized of lands, sells a part of them, and dies seized of the residue, his *heirs* are bound to satisfy the judgment, as far as the assets descended to them are sufficient for that purpose: and they are not entitled to any contribution from the purchaser of a part of the lands of *A.*, for they stand in the place of their ancestor, and there is no equality of right between them and the purchaser, in respect to the judgment.

If there are several heirs, and the judgment creditor collects the debt from a part of the inheritance allotted to one of them, such heir is entitled to contribution from his co-heirs. *It seems*, that between purchasers in succession, at different times, of different parts of the estate of the judgment debtor, there is no contribution, for there is no equality of right between them.

THE bill, filed *February* 26th, 1817, stated that *Jacob I. Vanderheyden*, deceased, and *Catharine*, his wife, being

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seized in fee of two lots of land, (Nos. 241 and 242) in *Troy*, conveyed the same by deed, dated *September* 10th, 1810, to the plaintiff, in fee, for the consideration of one thousand dollars, with covenant of warranty. That on the 5th of *September*, 1810, a judgment, by confession, was entered up against *J. I. V.*, in favour of *John Kimberly*, for 2,013 dollars 54 cents, debts and costs. That on the 27th *March*, 1811, *G. & H. Vail* recovered a judgment against *J. I. V.* for 203 dollars and 54 cents, damages and costs. That the sheriff of *Rensselaer* county, by virtue of writs of *fi. fa.* issued on these judgments, and others, seized all the real estate of *J. I. V.*, on the 13th of *May*, 1812, and sold the same, under the second judgment, subject to all incumbrances; and the defendant *J. D. Dickenson* became the purchaser for 3,410 dollars, to be applied to the payment of younger executions.

That the execution on the first judgment above mentioned was withdrawn, at the instance of *D.* That at the sale, it was well known to *D.* and to others concerned, that there were several incumbrances prior to the second judgment mentioned. That the payment of the elder incumbrances was considered as part of the purchase money, and the amount ascertained. That the real estate so purchased, was worth more than double the amount of the purchase money paid or to be paid by *D.*, including all older incumbrances. That *D.* refused to pay the judgment first above mentioned, or to disencumber the two lots of the plaintiff from it. That *D.* purchased that judgment, and procured an assignment thereof to be made to *G. Y. Lansing*, but for his own use and benefit, and procured the two lots so purchased by the plaintiff of *V.*, to be sold under that judgment, without the plaintiff's knowledge, and became the purchaser of the lots, on the 22d of *February*, 1813, for 650 dollars. That *J. I. V.* died on the 6th of *April*, 1813; and *D.*, on the 13th of *June*, 1816, procured his widow (defendant) to agree to

release her dower in certain real estate held by *D.*, and he agreed to convey to her one of the two lots (No. 242) so purchased by the plaintiff. That about 900 dollars was due on the first mentioned judgment, at the time of the sale of the plaintiff's two lots; and the proportion of that sum justly chargeable on the two lots of the plaintiff, (in case *D.* was not bound to discharge the judgment) would not, according to the 10th section of the act concerning judgments and executions, passed *March* 31st, 1801, exceed *sixty* dollars; and the residue, or 840 dollars, would have been justly chargeable on the real estate held by the defendant *D.*, subject to the judgment. That the plaintiff would have paid, before the sale, his proportion of the judgment chargeable on his lots, if the defendant *D.* would have paid his proportion, according to the act; and an application, for that purpose, was made on the part of the plaintiff, before the second sale, and *D.* gave encouragement as to the proposed arrangement, until the hour of sale, when he refused to enter into it. That at the time of the sale of the sheriff under the second judgment above mentioned, there was no *bona fide* incumbrance by *J. I. V.* on the two lots purchased by the plaintiff, except the judgment first above mentioned; and the property of *J. I. V.* in possession of, and purchased by *D.*, was worth fifteen times the amount of that judgment. The bill *prayed* for a discovery and production of deeds, &c., and that the plaintiff might be relieved from the sale of the two lots, absolutely, or conditionally, upon payment of his proportion of the said judgment, according to the said act; or that the defendant *D.* be decreed to convey lot No. 242 to the plaintiff, free from all incumbrances, &c.; and that the plaintiff might be relieved as to the right of dower; and that he might have an account of the rents and profits, since the death of *J. I. V.*, and for general relief.

The *answer* admitted that the sheriff, at the time charged in the bill, sold all the real estate of *J. I. V.* in his bailiwick;

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including the two lots conveyed to the plaintiff, to *D.*, for 3,410 dollars, and gave him a deed. But it denied that the sale was made subject to, or under any undertaking of *D.*, to pay all prior incumbrances, or that the execution on the first mentioned judgment was postponed, or withdrawn at the instance of *D.* It was admitted, that *D.*, at the time of sale, knew of the prior judgment, and that he purchased with an expectation of obtaining an assignment of it, to secure himself. That the defendants *D.*, *A. G. Lansing*, *John Willard*, and *T. W. Ford*, jointly paid the purchase money to the sheriff; and they denied that the first or elder judgment was considered as any part of the purchase money, or that they knew of the amount of all prior incumbrances, or that such amount entered into the estimate of the price. That the real estate of *J. I. V.* was, at that time, under heavy incumbrances, of various voluntary and fraudulent deeds, mortgages, and judgments, and the sheriff, for that reason, sold the whole together. That *D.* purchased for the benefit of the other three defendants above named, as tenants in common. That many of the antecedent incumbrances on the estate of *J. I. V.* remain unsatisfied. That the defendants, since the sale, have discovered that the title to a greater part is defective. That the lots of the plaintiff, at the time of the purchase in 1812, would have been worth 1,200 dollars; that the rest of the lands purchased by *D.*, would have been worth 20,000 dollars, if the title had been clear; that the purchase was hazardous, and *D.* paid the full value, considering the state of the title. That *G. Y. L.*, on the suggestion of the defendant *L.*, on the 16th of *May*, 1812, purchased and took an assignment of the prior judgment above mentioned, for 900 dollars, there being due thereon, including costs, 937 dollars. That there is no stipulation between him and the defendants, but they believe that *G. Y. L.* is willing to give them the benefit of that judgment, on being repaid what he has advanced. It was admitted, that the sheriff, on the 12th of *March*, 1813, sold the two lots of the plaintiff, on an execution issued on the prior judgment, and that the defendant

D. became the purchaser, for 650 dollars. That *Lemuel Hawley*, agent of *Hiram Clowes*, the uncle of the plaintiff, attended the sale, and bid. That the deed for the two lots was given to the plaintiff, at the instance and for the benefit of *Hiram Clowes*, and upon an usurious agreement between *H. C.* and *J. I. V.* That the defendant *D.* never heard of the deed to the plaintiff, until after his last purchase, though he had been informed that *J. I. V.* had sold the lots to *H. C.*, under an agreement between them. The agreement between *D.* and the widow of *J. I. V.*, of the 10th of *April*, 1816. as stated in the bill, was admitted.

Several witnesses testified that the sheriff sold the property of *J. I. V.*, under *Vail's* judgment, subject to all elder judgments and incumbrances; and they believed that these prior incumbrances entered into the calculations of the bidders. It appeared from the certificates of the clerks, that there were two mortgages on the property of *J. I. V.*, prior to the deed from him to the plaintiff, and which mortgages included the two lots conveyed to the plaintiff; and that there were also several judgments prior to the date of the deed. But the amount due on these mortgages and judgments was not ascertained.

T. Clowes, plaintiff, in person.

A. Van Vechten, for the defendants.

THE CHANCELLOR. When the plaintiff purchased his two lots of *Vanderheyden*, the residue of the real estate of *V.* was, in equity, first chargeable with the burden of payment of the prior judgment of *Kimberly*. If the owner of the judgment had attempted to enforce it against the two lots of the plaintiff, he would undoubtedly have been directed by this Court, upon due application, to have levied the judgment debt upon the lands remaining unsold by *V.*, because it was the proper debt of *V.*, and he ought to pay it. The creditor would have been entitled, in equity, to have resorted to

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the lots of the plaintiff, *only in the event* of the property remaining with *V.* not being sufficient to satisfy the judgment; and he would have been entitled to that resort only to the extent of the debt remaining unpaid, after the estate of *V.* had been exhausted. So, if *V.* had died seized of the residue of his real estate remaining unsold after the sale to the plaintiff, his heirs would have been bound to have discharged that judgment to the extent of the assets descended, and they would not have been entitled to any contribution from the plaintiff, seeing that there was no equality of right between them, in respect to that judgment debt. It would have been the exclusive duty of the heirs, to the extent of the assets, to have paid the judgment, and to have kept the plaintiff harmless, who was a *bona fide* purchaser from their ancestor, for a valuable consideration, and with covenants of warranty. If there were several heirs, and the estate of *V.* had been divided among them, and the judgment creditor had collected the debt from the portion of the inheritance allotted to one of them, such heir would have been entitled to contribution from his co-heirs, because the heirs would all have stood in *æquali jure*, in respect to the duty of discharging that debt; but he would not have been entitled to contribution from any other source.

A judgment creditor cannot enforce his judgment against the land of a subsequent purchaser, as long as there is other land of the debtor remaining, sufficient to satisfy the judgment. He can resort to the land sold, only for what remains unpaid of his debt, after the other estate of the debtor is exhausted.

Heirs who pay off the judgment debt of their ancestor, are not entitled to demand contribution of a purchaser of his land, subject to the judgment.

But if the portion of one heir has been taken to pay the debt of the ancestor, he is entitled to contribution from his co-heirs.

These principles of equity are clearly laid down in *Sir Wm. Harbert's case*, (3 *Coke*, 11. *b.*) where it was resolved, that if *A.* be seized of three acres, and acknowledge a recognizance or statute, and enfeoff *A.* of one acre, *B.* of another acre, and the third acre descends to his heir, and if execution be sued out against the heir, he shall not have contribution against the purchasers, "for the heir sits in the seat of his ancestor;" and the rule is the same though the purchaser take the land without a valuable consideration, and though the heir be charged as tertenant. (Vide *Harvey* v. *Woodhouse*, 1731. *Select Cas. in Ch.* 3, 4. *S. P.*) It was also held in the same case, that the land of the conusor in a recognizance was exclusively to be charged, when di-

yers persons have purchased any of the land subject to the recognizance, because the purchaser does not stand in the same degree with the conusor himself; but where there are several heirs, or where several persons join in a recognizance, one heir, or one conusor, should not be charged exclusively, for their relations and duties were equal, and the charge should be equal.

It seems that there is no contribution between purchasers in succession, at different times, of different parts of the estate of a judgment debtor.

This case settles the question of contribution as between the vendor and the purchaser, or the heirs of the vendor and the purchaser; and if there be several purchasers in succession, at different times, I apprehend that in that case, also, there is no equality, and no contribution as between these purchasers. Thus, for instance, if there be a judgment against a person owning at the time three acres of land, and he sells one acre to *A.*, the two remaining acres are first chargeable in equity with the payment of the judgment debt, as we have already seen, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to *B.* the remaining acre is then chargeable, in the first instance, with the debt, as against *B.* as well as against *A.*; and if it should prove insufficient, then the acre sold to *B.* ought to supply the deficiency, in preference to the acre sold to *A.*; because when *B.* purchased, he took his land chargeable with the debt in the hands of the debtor, in preference to the land already sold to *A.* In this respect, we may say of him, as is said of the heir, *he sits in the seat of his grantor*, and must take the land with all its equitable burdens; it cannot be in the power of the debtor, by the act of assigning or selling his remaining land, to throw the burden of the judgment, or a rateable part of it, back upon *A.* It is to be observed, that the debt, in this case, is the personal obligation of the debtor, and that the charge on the land is only by way of security; the case is not analogous to a rent charge, which grows out of the land itself, and where every purchaser of distinct parcels of a tract of land charged with the rent, takes it with such a proportionable part of the

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charge. The owners of the land, in that case, all stand equal, and if the whole rent be levied upon one, he shall be eased in equity, by a contribution from the rest of the purchasers, because of the equality of right between them. (1 *Eq. Cas. Abr. tit. Contribution, A.* 1.)

The case of *Gill* v. *Lyon*, (1 *Johns. Ch. Rep.* 447.) was decided upon the principles here laid down. A mortgagor sold part of the mortgaged premises to *Lyon*, for a valuable consideration, and then the residue was sold under subsequent judgments and executions, and it was held that the mortgage was first to be satisfied out of the lands purchased under the judgments, and that *Lyon* was not bound in equity to bear any proportion of the mortgage debt, unless the residue of the mortgaged premises should not be sufficient to satisfy it. The subsequent purchaser, under the judgments, took only such right as the mortgagor had in the remainder of the mortgaged premises; and the mortgagor was bound to apply the land he had retained, to discharge the mortgage debt, and not to suffer the debt to fall upon the portion of land he had sold; and in so discharging the mortgage debt, he would have no right of contribution against his own vendee. The purchaser under him, or under a subsequent judgment, by him suffered or confessed, could not be in any better situation, as it respected the prior purchaser.

To this effect was the observation of *Coke* and of *Hobart*, in *Fleetwood* and *Aston's Case*, (*Hob.* 45.) that as against his own conveyance, the conusee of a statute cannot require contribution.

In the present case, there was no right of contribution existing as between the parties to this suit. The judgment of *Kimberly* was chargeable upon the remaining property of *Vanderheyden*, purchased by the defendant *D.*, for the benefit of himself and the other three defendants, in *May*, 1812; and that property was, in equity, to be first applied to discharge it. When *Kimberly's* judgment was about to be enforced in *February*, 1813, against the two lots of the plain-

tiff, there can be no doubt that the plaintiff might, by application to this Court, have had that sale stayed, and have turned the defendants, as owners of that judgment, upon the other lands of *V.* which had been sold under a junior judgment. If these lands had been insufficient, then, indeed, the lots purchased by the plaintiff would have had to supply the deficiency. But if the other lands had been competent, (and of which no doubt can be entertained from the case,) neither *V.*, nor his heirs, nor his assignee or vendee, could, as owner of these lands, have had a claim upon the plaintiff for contribution. And there would have been the less colour of equity for such a claim, seeing that the sheriff's sale of these remaining lands of *V.* was expressly made subject to all prior incumbrances. This monition, given at the sale, removes all pretence for surprise or hardship in the case, for the purchasers took with full knowledge of the prior unsatisfied judgment of *Kimberly*.

But the purchasers under that sale have since acquired the ownership of *Kimberly's* judgment, and wielded it with a very inequitable hand. They have, by execution under it, sold the lots of the plaintiff, and purchased them in for their common benefit.

As owners of *Kimberly's* judgment, they have sold the lots of the plaintiff in part satisfaction of it, whereas it ought, in justice and equity, to have been entirely and exclusively satisfied out of the residue of the property of *V.*, of which the defendants were themselves the subsequent purchasers. The only question, then, in the case is, as to the proper relief, or indemnity to be afforded to the plaintiff. I do not think it would be expedient to direct a reconveyance of the lots. The sale was made in 1813, and the plaintiff waited four years, before he filed his bill, and the defendants have made expensive improvements on the lots, and agreed to sell one of them to the widow of *V.* and she has been some years in possession under that agreement. It is likewise stated, in the bill, that an application on the part of the plaintiff was made to the defendant *D.*, previ-

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ous to the sale of the lots, for some arrangement concerning a rateable discharge by each party of *Kimberly's* judgment, and that the proposition was rejected previous to the sale. There was no fraud in the sale, and the legal title passed by it. Under all these circumstances of notice, delay, and change of the property, I am not required, by any established principles of the Court, to disturb the title under the sale. It would be still more advisable, not to do it, if we may give credit to an averment in the answer, (and upon which the proof is silent,) that *Lemuel Hawley* attended at the sale and bid as agent for *Hiram Clowes*, the uncle of the plaintiff, and the beneficial owner.

If a judgment creditor proceeds to sell land sold to a subsequent purchaser, when there is other land of the debtor, sufficient to satisfy the judgment, the court will interfere and stop the sale.

But if the subsequent purchaser knows of the sale of his land, and neglects to apply to the Court, in due season, the sale under the execution will not be disturbed; but the judgment creditor must, by way of indemnity, pay him, at least, the amount for which his land was sold.

The lots were purchased by the defendants for 650 dollars; and the plaintiff has been obliged to contribute that sum towards the satisfaction of *Kimberly's* judgment, when he ought not to have contributed any thing, and that sum, at least, with interest, ought to be refunded. The 650 dollars may not be considered as an adequate price for the lots, for the defendant says, they were worth, when he purchased the residuary estate of *Vanderheyden*, in 1812, the sum of 1200 dollars; but this was to be taken with the condition that the title to them was clear and perfect. The certainty of an unincumbered title is not established; and it appears by the certificates of the clerks, that there were two mortgages, and several judgments, which existed prior to the deed to the plaintiff, and were liens upon those lots. The plaintiff has no just cause to complain, if the sale, in this case, be taken as the value, inasmuch as he did not interpose effectually, (as he might have done,) before the sale, to stay it, and the agent of *Hiram Clowes*, said to be the beneficial owner, did actually attend the sale, and bid a price, inferior to that bid by the defendant *D.* This agent is the person who possessed all the right and interest of the plaintiff to the lots, under a quit-claim deed of the 22d of *July*, 1813, and held the same until the conveyance was vacated as to the two lots in

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question, by a decree entered by consent, the 9th of *December*, 1816.

I shall accordingly declare, that the judgment debt of *John Kimberly*, in the pleadings mentioned, was, in equity, chargeable upon the real estate of *Jacob J. Vanderheyden*, not conveyed to the plaintiff by the deed of the 10th of *September*, 1810, and ought to have been collected exclusively out of that estate, whether in the hands of the said *Jacob*, or of his heirs, or assignees, or purchasers under him, or under title derived from him, subsequent to the 10th day of *September*, 1810, and that the lots in the pleadings mentioned as being conveyed to the plaintiff, ought not in equity to have been contributory to the payment of that judgment debt, except so far as that real estate should have been found insufficient for the purpose. And that the sale of the plaintiff's lots, on the 12th of *March*, 1813, as in the pleadings and proofs mentioned, by the owners of the said judgment, in order to satisfy the same, in exemption of the said real estate, was contrary to the principles of equity, and the plaintiff is entitled to have the amount of such sale (and which, under the special circumstances disclosed in the pleadings and proofs, is assumed, as between these parties, to have been the then value of the lots,) refunded, with interest. It is, thereupon, ordered, &c. that the defendants, (except *C. V.* as to whom the bill is dismissed with costs,) pay to the plaintiff, in thirty days after due notice of this decree, 650 dollars, with interest from the 12th of *March*, 1813, and the costs of this suit to be taxed.

July 5. This cause was brought to a rehearing by consent, on the question as to the damages.

Re-hearing as to the damages.

THE CHANCELLOR. The plaintiff contends, that there ought to be an inquiry as to the actual value of the lots, at the time of the purchase by the defendants, and that the price bid by the defendants ought not to be assumed as the test of value. But, under the circumstances of the case, I do not

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think that the decree ought to be altered on this point. The deed to the plaintiff was executed to him, while, as the deed expresses it, he was "a student in *Union College*;" and the reason of the quit-claim deed from him to *Lemuel Hawley*, in *July*, 1813, and then of the decree entered by consent, in *December*, 1816, that the deed should be cancelled only so far as respected these two lots, is not accompanied with any explanation by proof. The answers state, that the deed to the plaintiff from *J. I. V.*, was given at the instance, and for the benefit of *Hiram Clowes*; and that *Lemuel Hawley*, as the agent of *H. C.*, attended at the sale of these two lots, and bid. The circumstances of the case lead to the inference and belief, that the plaintiff was, originally, only a *dramatis persona*, and that his name was used as a cover for interests not his own; and that when *L. H.* attended at the sale, he attended as the representative of the owner, whoever that owner might be.

The sale was in *March*, 1813, and the plaintiff is presumed to have known of the sale, and of the agency of *Hawley*; yet he afterwards voluntarily made a conveyance of the property to him. I have no evidence that the conveyance was unduly obtained, for it was afterwards rescinded by agreement, and then only in part. The notice given by the plaintiff to the defendants, that he intended to question their title, was after the conveyance to *Hawley*, and was, therefore, of no avail. The plaintiff might have stayed the sale before it was made. He waived that, and instead of seeking relief promptly upon the sale, he afterwards conveyed his equitable title to *Hawley*, and waited until 1817, before he commenced this suit. Under these circumstances, the title ought not to be disturbed, nor the improvements affected; and as incumbrances are shown to have existed on the lot, and are left without explanation, the plaintiff ought to be confined to the price which the defendants gave, and which *Hawley* was not willing to give.

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The plaintiff again contends, that as the late wife, now the widow of *J. I. V.* joined in the deed to him, and thereby barred her right of dower, he is entitled to the value of her dower accruing at her husband's death. But I do not apprehend that he could bring any action at law or in equity, for that dower. There is no such action in the books; and her joining in the deed was only a release or bar of her future contingent interest. It was not the alienation of a real, subsisting interest, which can now be the subject of computation or recognition. He took the lots discharged of that claim; and he has no right or interest which can be set up, as distinct from the title to the fee. The right was extinguished and gone forever by the deed, and the title to the lots, in whomsoever it now resides, is held free and discharged from that claim.

The decree, therefore, of the 7th of *May* last, is, in every respect, confirmed.

SMITH *against* LASHER and another.

A defendant, as to facts not within his knowledge, must answer as to his *information and belief*, if he has any information on the subject, distinct from the bill.

It is not sufficient to answer to certain specific facts charged in the bill, "that they may be true, &c. but the defendant has no knowledge of, but is a stranger to, the foregoing facts, and leaves the plaintiff to prove the same."

Nor is it sufficient to say, "the defendant has not any knowledge of the foregoing matters, but from the statement thereof in the bill:" but the defendant should answer as to his information and belief, and admit or deny any information *dehors* the bill.

FIVE exceptions were taken to the answer, for insufficiency, which were referred to the master, who reported that

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the first, second, third, and fifth exceptions were not well taken. The plaintiff excepted to the master's report.

D. Cady, for the plaintiff, and in support of the exceptions to the report.

Henry, contra.

THE CHANCELLOR. As to the first exception, the answer to certain specific facts charged in the bill, states, "That it may be true, &c. but that they have no knowledge of, and are strangers to, the foregoing facts, and leave the plaintiff to prove the same." This is not a sufficient answer to facts which are not in the defendants' own knowledge. A defendant ought to answer according to his *information and belief*, if he has any information on the subject distinct from the bill. This was the rule of pleading stated in *Woods* v. *Morrell*; (1 *Johns. Ch. Rep.* 107.) and the authorities there referred to, show the rule. There was nothing said in *Morris* v. *Parker*, (3 *Johns. Ch. Rep.* 297.) in opposition to this rule. It was only declared, that when the defendant averred, in his answer, that he had no knowledge *or information* as to the matter of fact charged, he was not bound to say any thing as to his belief, and that when he was required to state his belief, if any, it was when he referred to information or hearsay. "As to the act of another," says *Bohun's Cur. Can.* (p. 111.) "and which act the defendant does not certainly know, he ought to say, *he has heard and thinks, or believes it to be true*, or that *he does not think or believe*, &c. and not to say only *that he has heard.*" The same precise rule is laid down in *Wyatt's P. R.* 14. and 1 *Har. Pr. in Chancery*, 302. and in *Cooper's Tr. of Pleading*, 313. In the latter work, the rule is stated in these words: "But as to facts which have not happened within his own knowledge, he must answer as to his information and belief, and

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not to his information merely, without stating any belief either one way or the other."

In the present case, the defendants answer as to knowledge, but they were bound to answer as to *information* likewise, and if they had information, they were to add their belief arising upon that information. Instead of this, they say, they are *strangers to the foregoing facts*. These are words of equivocal import. They may be strangers to the facts, and yet have information and belief in respect to them; or they may be strangers to the facts, and have no information concerning them. There is danger in permitting such loose and indefinite terms to supply the place of the simple averment, that the defendant had *no information*, or was *utterly and entirely ignorant* of the fact. The first exception ought, therefore, to have been allowed. The second and third exceptions are equally well founded. The answer states, that the defendants "have not any knowledge of the foregoing matters, but from the statement thereof in the bill." They may have had information, and not knowledge of the facts, and they were bound to answer to their information and belief, and to admit or deny an information *dehors* the bill. The second and third exceptions ought also to have been allowed by the master. In other respects, the report of the master was correct.

The exception to the report, in respect to the 1st, 2d, and 3d exceptions to the answer, is allowed, and the residue of the exception to the report disallowed.

The question of costs is reserved.

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J. R. LIVINGSTON *against* GIBBONS, *impleaded* with OGDEN.

Where an injunction has been voluntarily dissolved by the plaintiff, or having been dissolved by an order obtained by his agent or solicitor, without his knowledge and consent, but which was, afterwards, recognized and acted upon by him, the injunction will not be renewed upon his petition, without some new and special reasons, which did not exist when the injunction was originally granted or dissolved.

May 8th. PETITION of the plaintiff, stating, that on the 3d of *May*, 1819, he filed his bill, setting forth, among other things, an assignment from *R. R. Livingston* and *Fulton* to him, of their right, under the several acts of the Legislature, &c., to navigate with *Steam Boats*, from any place within the city of *New-York*, south of the *State Prison*, to the *Jersey* shore and *Staten-Island*, to the south of *Powles' Hook* ferry, and to the north of *Sandy Hook*, to wit, to *Staten-Island*, *Elizabethtown Point*, *Perth* and *South Amboy*, and the *Raritan* river up to *Brunswick*; and the sole right to use such Steam Boat, to the exclusion of all others, to the places above mentioned, so long as the grant to *L.* and *F.* should be in force. That the plaintiff had constructed and put in operation, within the limits so described, a Steam Boat called the *Olive Branch*. That the defendant *G.*, in violation of the plaintiff's exclusive right, attempted to interfere with it, and to navigate within the said limits, by a Steam Boat, called the *Bellona*, &c. That this Court, thereupon, granted an injunction, restraining the defendant *Gibbons* from navigating with any Steam Boat *the waters of the bay of New-York* and of the *Hudson river*, between *Staten-Island* and *Powles' Hook*; which injunction was duly served upon the persons employed in navigating the Steam Boat called the *Bellona*.* That on the 25th of *February*, 1820, the legislature of *New-Jersey* passed an act, to preserve and support the jurisdiction of that state,

* *Vide.* vol 4. p. 416—422.

&c. a copy of which was annexed to the petition. That the plaintiff continued to run his Steam Boat, called the *Olive Branch*, within the waters aforesaid, to *Perth Amboy*, and up the *Rariton* to *New-Brunswick*, in the state of *New-Jersey*, until the defendant *G.*, on the 8th of *May*, 1820, under pretence of the said act of the Legislature of *New-Jersey*, and with a view to defeat the plaintiff's use of his said right, filed his bill in the Court of Chancery of *New-Jersey*, alleging himself to be a citizen of *New-Jersey*, and owner of the Steam Boat *Bellona*, and under pretence that he was enjoined by the order of this Court, under the acts of the legislature of this state, from navigating with Steam Boats on the waters of this state, and under pretence that the injunction aforesaid, comprehended waters not within the exclusive jurisdiction of this state. That *G.*, upon that bill, obtained an injunction from the Court of Chancery of *New-Jersey*, restraining the plaintiff from navigating the waters of *New-Jersey*, with Steam Boats, and from transporting any passengers from the city of *New-York*, or from *Staten-Island*, into *New-Jersey*, in whatever way the transportation be effected in Steam Boats. That the said injunction was served on the officers of the Steam Boat *Olive Branch*, at *New-Brunswick*, on the 10th of *May*, 1820, and afterwards on the plaintiff. That the defendant *G.* also prosecuted three several attachments, under the act of *New-Jersey*, for alleged damages, on three successive days, of twenty dollars each, and two other attachments, for 475 dollars each, and attached the *Olive Branch*, as she arrived, from time to time, in the regular prosecution of her trips to *New-Brunswick*. That the master of the *Olive Branch*, to procure her liberation from such attachments, was obliged to give security for the damages so claimed. That when the *Olive Branch* was liberated from the last attachment, she returned to *New York*, and the plaintiff discontinued navigating her to the *Jersey* shore. That on the 31st of *May*, 1820, the plaintiff commenced

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running his said boat to *Staten-Island*, opposite *Amboy*, not touching in *New-Jersey*; and the passengers transported in the boat to *Staten-Island*, proceeded to *Amboy*. That the defendant *G.*, under pretence that such transportation and landing of passengers was an infringement of the injunction issued by the Court of Chancery of *New-Jersey*, caused the same injunction to be served on the ferrymen who transported the passengers from *Staten-Island* to *New-Jersey*, and on the owners of the ferry, and on twenty-five persons, in the whole. That in the beginning of *July*, 1820, the defendant caused three of the ferrymen to be attached and imprisoned, for an alleged breach of the injunction, and they gave bail to answer for the alleged contempt. That the son of the plaintiff, while at *Amboy*, was served with the said injunction, on the 6th of *July*, and having, on the 12th of *July*, proceeded in the *Olive Branch*, from *New-York* to *Staten-Island*, and from thence, in a fisherman's boat, to *New Jersey*, he was taken on an attachment prosecuted by the defendant *G.* for an alleged contempt of the said injunction, by assisting the owner of the fisherman's boat in rowing, and was taken to *New-Brunswick*, where he was obliged to give security to appear and answer for the contempt. That the defendant came to *Perth Amboy*, and offered a reward of fifty dollars, to informers of any breaches of the injunction of the Court of Chancery of *New-Jersey*, by persons living on *Staten-Island*. That the plaintiff's son, on the 20th of *July*, 1820, without the previous knowledge, privity or assent of the plaintiff, procured the plaintiff's solicitor to enter an order in this Court, as of course, to dissolve the injunction in this cause. That the plaintiff was ignorant of the intention of his son to dissolve the injunction in this cause, or of the dissolution of it, until some time after it was done; and that it was done contrary to his wishes, and without his authority. That the defendant *G.* finding himself under no restraint, has lately established his Steam Boat

Bellona, on the route between *New-York* and *New-Jersey*, formerly occupied by the plaintiff, and is daily navigating his said boat from *New-York* to *New-Brunswick*, over the bay of *New-York*, &c., in violation of the plaintiff's exclusive right, founded on the acts of the legislature of this State, &c. *Prayer*, that the order dissolving the injunction in this cause may be vacated, and that a new injunction issue to restrain *G.* from navigating, with Steam Boats, the waters of this State, in the bay of *New-York* and the *Hudson* river, south of the state prison, &c. &c. &c.

The petition was sworn to on the 3d of *April*, 1821. Annexed to the petition was the affidavit of the plaintiff's son, that he procured the plaintiff's solicitor to obtain the order to dissolve the injunction, without the previous knowledge, direction, or consent of the plaintiff; and that the injunction was dissolved without any agreement or understanding with *G.* or his solicitor.

In opposition to the prayer of the petition, the affidavit of *G.* and several papers were read: it was stated, that the first notice *G.* had of the dissolution of the injunction, or of any intention to dissolve it, was from the copy of the order dissolving it. That the plaintiff made use of the order dissolving the injunction in this cause, to obtain a dissolution of the injunction of the Court of Chancery of *New-Jersey*, in the cause of the defendant *G.* against him. That on the 25th of *July*, 1815, a notice and copy of a petition in the cause in the Court of Chancery, of *N. J.*, with a certified copy of the order of this Court, of the 20th of *July*, dissolving the injunction, was served on *G.* The notice was of a motion to be made in the cause of *G.* v. *J. R. L.*, in the Court of Chancery of *N. Y.* on the 4th of *August*, to dissolve the injunction in that cause, and to discharge the several attachments issued in the cause. The petition of *J. R. L.* disclaimed all intentional contempt of the Court; and stated that he had ordered the officers of

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the *Olive Branch* to keep within the waters of *New-York*; that having removed the injunction against *G.* (as appeared by the the certified copy of the order, annexed to the petition), referred to in his bill, and which was the foundation of his proceeding, the petitioner prayed that the attachments might be discharged, and the injunction dissolved. The Court of *New-Jersey* granted the prayer of the petitioner, and an order was entered accordingly. The affidavit of *G.* stated that the injunction obtained by him in *N. J.* was not applied for in consequence of the terms of the injunction of this Court; but solely on the ground that *G.* being a citizen of *N. J.* had a right to navigate with Steam Boats any of the waters between the ancient shores of *N. J.* and *N. Y.*, and that any restraint under the laws of *N. Y.* was an infringement of that right. That after the dissolution of the said injunction, the boat of the defendant *G.* called the *Bellona*, was employed in navigating between *New-York* and *New-Brunswick*, until the 16th of *December*, 1820, when she was interrupted by the ice, and was seized by the plaintiff or his agents, under a pretence of claim to her as forfeited. That having recovered possession of his boat, and understanding that the plaintiff threatened to cause her to be seized, a bill was filed on the equity side of the Circuit Court of the *U. S.* for the district of *New-York*, to restrain the plaintiff from so doing, and an injunction was granted by that Court, which was served on the plaintiff; and which suit in the Circuit Court of the *U. S.* is still pending, and that injunction in full force. The decretal order of the Court of Chancery of *N. J.* recited that *J. R. L.* had caused to be dissolved on the 20th of *July*, 1820, the injunction granted in this suit against *G.*, and that the motion for dissolving the injunction in that cause had been argued by the counsel on both sides, and that the defendant in that cause having first cleared his contempt, &c., by paying the costs of the attachments

&c., and the counsel being heard upon the merits; all further proceedings on the attachments were ordered to cease, and the injunction to be dissolved, on payment of the costs of that suit.

Van Vechten, in support of the motion for vacating the order of the 20th *July*, 1820, and granting an injunction according to the prayer of the petition.

Henry, contra.

THE CHANCELLOR. The injunction which was granted in this cause, on the 3d of *May*, 1819, was voluntarily dissolved, on the motion of the plaintiff's solicitor, on the 20th of *July*, 1820. The plaintiff now states in his petition, that the order for dissolving the injunction was procured by his son, "without his knowledge, privity, or assent;" and that it was contrary to his wishes. Admitting this to have been the fact, yet we find that the plaintiff, very shortly thereafter, acted upon that order, and gave it his undoubted ratification. It appears that his boat, the *Olive Branch*, had been restrained by process of injunction from the Court of Chancery of *New-Jersey*, from navigating the waters of that state, and that the boat had been subsequently attached, and process of attachment had been served upon the son of the plaintiff, and on the master of the *Olive Branch*, and also on other persons acting under the plaintiff, for breach of that injunction. The order of the 20th of *July*, was entered for the purpose of being relieved from that restraint and these attachments; and we accordingly find, that on the 25th of *July*, 1820, the solicitor of the plaintiff gave notice of a motion to be made before the Court of Chancery in *New-Jersey*, for the dissolution of the injunction in *New-Jersey*, and for the discharge of the attachments. The motion was made and argued on the 4th of *August*, 1820, and it was founded on a petition of the present plaintiff, shown to have been subscribed by him, and in which he stated, that "hav-

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ing removed the injunction against *Thomas Gibbons*, as per certified copy of an order of the Court of Chancery of the state of *New-York*, annexed, referred to in the bill of complaint of said *Thomas Gibbons*, and which is the foundation of his proceedings," he thereupon prayed that the attachments might be discharged, and the injunction dissolved.

Here was a full and formal recognition of the act of his son, and of his solicitor, in procuring the injunction issued from this Court to be dissolved. *Omnis ratihabitio retrotrahitur et mandato æquiparatur.* It is a little extraordinary, that if the order for dissolving the injunction was procured without his knowledge, and contrary to his wishes, that the plaintiff should a few days thereafter, in his petition to the Chancellor of *New-Jersey*, speak of "having removed" the injunction by the order referred to. He treated it, in that petition, as an act of his own, or flowing from his authority.

The plaintiff was successful in his petition, and the voluntary dissolution of his injunction here, procured the dissolution of the defendant's injunction in *New-Jersey*. The dissolution here was without the knowledge or co-operation of the defendant, who even resisted the motion of the plaintiff in the *New-Jersey* Chancery. This act of dissolution of the injunction was made the ground of the decretal order in *New-Jersey*, for dissolving the injunction and discharging the attachments there; and it would seem to be contrary to equity and good faith, for the plaintiff, after having obtained a valuable consideration for the dissolution of his injunction, to procure it to be restored. He ought, at least, to consent to place the defendant *G.* in *statu quo*, and to restore him to all the legal privileges and advantages which he possessed, when the plaintiff applied to have them withdrawn, by reason of the very act which he now seeks to avoid. But I cannot impose, (and if I did, it would be ineffectual,) as a condition to the granting of the present motion, that the defendant be reinstated in all his rights and privileges in the

other state. To do this, the security or bail which was given on the attachment of the *Olive Branch*, and on the attachment of the several persons who were charged with breaches of the *New-Jersey* injunction, ought to be replaced, and the Chancery suit revived. I presume all this cannot be done, and that the circumstances of the case are so changed, that things cannot be replaced in their former condition, and with their former force and effect. And if it could be done, what right has the plaintiff to ask it? There was no fraud, imposition, or mistake, in the voluntary act, or in the voluntary ratification of the act, of dissolving the former injunction. *Volenti non fit injuria.* It would be unjust in itself, and derogatory to the authority and dignity of the administration of justice, to suffer the process of the Court, imposing great and inconvenient restrictions on the defendant, to be withdrawn, in order to procure, by the operation of that fact, advantages against that very defendant, and against his consent, in his counter suit, and then to be reinstated in its former vigour. I shall certainly not permit the process of this Court to be so used and so abused.

I do not mean to be understood to say, that the plaintiff has lost forever his exclusive privilege under his grant from *Livingston* and *Fulton*, as against the defendant. I am not prepared to say to what extent, and for what period, the injunction so withdrawn, is hereafter to be withheld. I mean only to say, that upon this interlocutory motion, and without any new and special reasons, not existing when the injunction was originally granted, or when it was dissolved, I shall not consent, as of course, to renew the injunction. It was granted, in the first instance, upon consideration and argument, as a necessary, but unpalatable measure, flowing from the exclusive grant to *L.* and *F.* It has been steadily maintained, for upwards of fourteen months, against the persevering efforts of the defendant *G.*, to elude or question its authority. This very process, of which we are speaking,

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led to grave and momentous consequences. It produced, as an act of retaliation, the law of *New-Jersey*, of the 25th of *February*, 1820, referred to in the plaintiff's petition; and it produced the bill, injunction, and attachments under that law, against which the plaintiff sought to be relieved, by the voluntary sacrifice of his injunction in this Court. He has made the sacrifice, and has obtained what he deemed the equivalent, and he must, in the present state of the case, be content to abide by his election. This Court gave him full and absolute protection, under the monopoly, and it would have continued that protection, uninfluenced by any thing that had been done in *New-Jersey*, if the plaintiff had not thought proper, of his own accord, to renounce it. Possibly, the plaintiff may have acted injudiciously in the choice of his means to obtain relief in *New-Jersey*. A wiser course may have been, to have left his own injunction undisturbed, and to have questioned and litigated, from Court to Court, (if necessary,) the validity of the statute of *New-Jersey*, and the proceedings under it, until he had obtained a final decision on the constitutionality of that law of reprisals, in the Supreme Court of the *United States*. But if he has committed an error in judgment, neither this Court, nor the defendant are responsible, in any degree, for that error; and I think that good faith requires that he should not now lightly attempt, nor lightly be permitted to retrace his steps.

The motion was denied, with costs to the defendant for resisting it, and the following order entered:

"*It appearing* that the said order of the 20th of *July* last was entered upon the motion of the plaintiff's solicitor, and was on a petition made and subscribed by the plaintiff to the Chancellor of the State of *New-Jersey*, on the 4th of *August* last, mentioned and recognized as his own act, and made the ground of an application for relief against an injunction issued by the Court of Chancery of *New-Jersey*, in favour of the defendant against the

plaintiff, and for relief against several attachments issued for breaches of that injunction. *And it further appearing*, that the act of dissolution of the injunction in this Court, was the efficient cause of the dissolution of the injunction, and of the discharge of the attachments in *New-Jersey*, upon such application, and that the plaintiff thereby obtained, what he deemed to be an equivalent for the voluntary discharge of his injunction from this Court, justice and good faith not permitting the injunction here to be renewed under the present circumstances of the case: It is thereupon ordered, that the said motion be denied, with costs to be taxed, and to be paid by the plaintiff to the defendant, for resisting the motion."

E. H. SEARS and others *against* POWELL.

A motion by the plaintiff to have his name struck out of the bill, because it was inserted without his knowledge or consent, is too late, after publication passed, and when the plaintiff knew that his name was used, immediately after the bill was filed, and suffered more than a year to elapse before he made his application.

THE cause was at issue, and publication had passed. A motion was now made, on the part of one of the plaintiffs, to have his name struck out of the bill, on the ground, that it had been inserted without his knowledge or consent. *May 28th.*

Selden and *White*, in support of the motion.

D. Ruggles, contra. He read an affidavit, stating, that the other plaintiffs were insolvent, and that the plaintiff, who now seeks to have his name struck out of the bill, applied to the solicitor of the defendant for his consent, more than a year since, and the solicitor refused to give

1821.

TILLOU v. SHARPSTEEN.

his consent; and that the plaintiff knew that his name was used, immediately after the bill was filed. The counsel cited *Titterton* v. *Osborne*, *Dickens' Rep.* 350.

THE CHANCELLOR. The motion must be denied. The delay was fatal to the plaintiff's application. If he has been injured by the use of his name, he must have his resort to the solicitor, who has made use of it, for his indemnity.

Motion denied.

TILLOU *against* SHARPSTEEN.

An injunction to stay proceedings under a power to sell contained in a mortgage, was retained, though it appeared that the mortgage had been discharged, until an action at law brought by the plaintiff against the defendant on the covenant of seisin in his deed to the plaintiff, was decided.

June 4th.

BILL filed for an injunction to stay proceedings under a power to sell contained in a mortgage, on the ground that there was an outstanding unsatisfied mortgage on the premises at the time of the execution of the deed to the plaintiff, which was unknown to him, and also, because the defendant had no title when he conveyed to the plaintiff. An injunction was granted.

A motion was now made to dissolve the injunction. It appeared that the outstanding mortgage had been discharged; but it also appeared that the plaintiff had sued the defendant on his covenant of seisin, and that there had been a trial at law, and a verdict taken in favour of the plaintiff, subject to a case which had been made, and which was now ready for argument in the Supreme Court.

P. Ruggles, for the motion.

Bloom, contra.

1821.

MATTER OF ELLISON.

THE CHANCELLOR, under the circumstances of the case, retained the injunction, until the decision at law upon the case made.

There were other points in the case, but it is not thought material to state them.

In the matter of ELIZA ANN ELLISON and others, *infants*.

Where a conveyance is directed to be made by *infants*, in performance of an agreement entered into by their ancestor, in his lifetime, who had stipulated to give a deed with full covenants to the purchaser, the Court will not order the infants to enter into personal covenants, but only to release and convey all the title whereof their ancestor died seised.

The principal of the purchase money, however, was ordered to be retained subject to the further order of the Court, or until the infants come of age, to provide an indemnity to the purchaser, in case the title should, in the mean time, fail.

PETITION by *Youle*, for the specific performance of a contract entered into with the ancestor of the infants, for a purchase of certain lots in the city of *New-York*, for which the ancestor was to give a deed with full covenants. *June 4th.*

With the consent of all parties concerned, a conveyance on the part of the infants was ordered, on payment of the consideration; but it was insisted on behalf of the petitioner, that the infants, by their guardian, should enter into a personal covenant, such as their ancestor had agreed to give, to ensure the title.

1821.

FERRIS v. NELSON.

C. Graham, for the petitioner.

THE CHANCELLOR refused to make an order that the infants should enter into any personal covenants. He said, that they could not be so bound, and that the only order to be made was that they should, by their guardian, release and convey all the title whereof their ancestor died seized. But, for the greater safety of the purchaser, he directed that the guardian should invest the consideration money to be received on delivery of the deed, in good real security or government stock, and appropriate the interest or dividends, if necessary, for the maintenance and education of the infants, but retain the principal, subject to the further order of this Court, on the infants coming of age, to the end that an indemnity might be provided for the purchaser, if the title should, in the mean time, fail.

Order accordingly.

FERRIS *against* NELSON and NELSON, *executors*, &c.

NELSON and NELSON, executors, *against* FERRIS.

To a bill to correct a mistake in a deed, the defendants put in an answer, and, also, filed a cross bill for discovery. The plaintiff in the original bill having, as of course, without notice, dismissed his bill: *Held*, that the defendants were not only entitled to *costs* on the dismissal of the plaintiff's bill, but, also, to the costs of their *cross bill*, as a part of their defence in the original suit.

June 7th.

BILL to correct a mistake in a deed. An answer was put in by the defendants *N.* and *N.*; and a cross bill filed by them for discovery. The plaintiff in the original suit entered an order, as of course, and without notice, for

1821.

M'Comb v. Wright.

the dismissal of the original bill, with costs. The question raised was, whether the defendants *N.* and *N.* were not, also, entitled to the costs of their cross bill, as being a necessary part of their defence.

Silliman, for the defendants, *N.* and *N.* He cited 1 *Maddock's Tr.* 176. *Peake's N. P.* 203. *Mitf. Tr.* 165. 3 *Atk.* 812. *Cooper's Tr.* 86.

Dyckman, contra.

THE CHANCELLOR held, that the defendants in the original suit were entitled to be paid the costs of their cross bill, as being part of their defence in the original suit, and as being no more than a part of their just indemnity for a groundless suit against them. It was thereupon *ordered*, that in the taxation of costs in the original suit, the costs of the cross bill, together with the costs of this motion, should be allowed to the defendants, and that the cross bill stand dismissed, with costs to be taxed as aforesaid, in favour of the plaintiffs in such cross bill.

M'COMB, executor of THOMAS OGILVIE, *against* WRIGHT.

Ignorance in a family of the existence of one of the children, who had gone abroad, at the age of twenty-two, unmarried, and had not been heard of for upwards of forty years, is sufficient, with other circumstances, to warrant the Court or a jury to presume the fact of his death without issue.

THIS cause came to a hearing on exceptions to the master's report, which was in favour of the competency of the plaintiff to give a good title, and such as a purchaser might safely take. *June 7th.*

1821.

M'Cobb v. Wright.

The report stated, that *Alexander Ogilvie* was seized in fee, of the lot in question, and by his will, dated 21st of *January*, 1748, he gave all his estate, real and personal, to his wife for life, and then to his children, *Alexander*, *Thomas*, *Jane*, *John* and *Catharine*, as joint heirs. He died seized, prior to the year 1770. His wife took the rents and profits, and died in 1777. On the 14th of *March*, 1786, *Alexander* and *Jane*, two of the children, by a warranty deed, conveyed the lot to *Thomas*, for a valuable consideration, and that deed recited the death of *Catharine* in 1754, without husband or issue. *Thomas* pulled down the old house, and built a new one, and continued in peaceable possession thereof, and in the receipt of the rents and profits, until his death, in *March*, 1815, and his executor, who was authorized by his will to sell, held the same, until the sale by him to the defendant, in *January*, 1819. The master reported the death of *Catharine*, as recited in the deed; and that *John* went to *England* a short time before the Revolutionary war, at the age of twenty-two, unmarried; and had not been heard of since the commencement of that war. He had threatened to drown himself, and it was believed among his acquaintance in *London*, that he had drowned himself in the *Thames*. *Sarah Hunt*, a witness, aged 62 years, and intimate with the *Ogilvie* family, testified that her first acquaintance with the family commenced when she was about ten years old, and continued until she married, after the revolutionary war. That she was frequently an inmate of the family, and never heard of a daughter named *Catharine*, which from her intimate acquaintance with the family, and particularly with the mother, she must have done, had *Catharine* been living, and she had, therefore, no doubt, that *Catharine* died in early infancy, and before her acquaintance with the family.

The exceptions to the report were,

1. That there was not sufficient proof that *Catharine* was

not dead, or if dead, that she died unmarried, and without issue. 1821.

2. That the evidence as to the death of *John* was vague, and afforded no foundation for that presumption. WOOLSEY v. LIVINGSTON.

THE CHANCELLOR overruled the exceptions, and held, that lapse of time, and family ignorance of the existence of *Catharine* or *John*, for upwards of forty years before the sale in question, and the other circumstances, were sufficient to warrant this Court, or to warrant a jury, in a Court of law, and to render it the duty of either, to raise the presumption of death, without issue. That the title under the will of the plaintiff's testator was, therefore, to be deemed good.

WOOLSEY and others *against* LIVINGSTON and THOMPSON.

L. and *T.* as assignees of *B.*, filed a bill to foreclose a mortgage against *W.*, who put in his answer, and then filed a bill against *L.* and *T.* for relief against the mortgage, and also against a judgment and execution. *W.* died before any decree to account in the suit to foreclose: *Held*, that the bill filed by *W.* partook of the nature of an original, as well as a cross bill, and that his legal representatives might file a bill of revivor against *L.* and *T.*, to which the defendants must answer.

BILL of revivor, filed *September* 1, 1820, by the plaintiffs, as children and heirs at law of *Melancthon L. Woolsey*, deceased, and by the plaintiff *M. T. W.*, as administrator of the said *M. L. W.* It stated, that the ancestor filed his bill, on the 11th of *June*, 1819, against the defendants, as assignees of *Matthew Van Benschoten*, deceased, and in which he stated, that on the 1st of *July*, 1800, he executed a bond to *M. V. B.*, conditioned for the payment of 500 dollars, with *June 12th.*

1821.

WOOLSEY v. LIVINGSTON.

interest, and also a mortgage to secure the same; that the bond and mortgage were assigned to *Gilbert Livingston*, (of whom the defendant *L.* was executor,) and to the defendant *T.*, and that he, the ancestor, on the 19th of *November*, 1801, executed his bond to *G. L.*, conditioned for the payment of 466 dollars; on which last bond, the defendant *L.*, as executor, entered a judgment in the Supreme Court, in 1809, and issued an execution, with directions to levy the penalty, with interest and costs, (1,105 dollars 14 cents.) That the defendants had filed their bill to foreclose the mortgage so assigned, as aforesaid; that *G. L.* had received divers sums towards payment of the two bonds, and that they were both satisfied. The bill concluded with a prayer to redeem the mortgage, and that the bond and mortgage given to *M. V. B.*, and so assigned, might be brought into this Court and cancelled, and that the sums paid might be accounted for, and the judgment cancelled, and the defendant *L.* restrained from proceeding on the judgment and execution aforesaid.

An injunction issued, as prayed for. The bill of revivor further stated, that *M. L. W.* afterwards died, whereby the suit abated, and that the plaintiffs were his legal representatives; and *prayed* that the bill might stand revived, and for process of subpœna, &c.

The bill of *M. L. W.* against the defendants, recited in the bill of revivor, was partly of the nature of a *cross bill*, as the defendants had, on the 11th of *November*, 1818, filed their bill to foreclose the mortgage so given to *M. V. B.*, and assigned to *G. L.* (of whom the defendant *L.* was executor,) and the defendant *T.*, and *M. L. W.* had put in his answer to that bill on the day that he filed his bill.

To this bill of revivor by the representatives of *Woolsey*, the defendants demurred, and assigned for cause, that if the bill of revivor be true, it does not contain ground for any decree or relief to the plaintiffs, because, as there was no decree for an account in the original suit, filed by the present defendants, the present plaintiffs are not entitled to revive.

Foote, for the plaintiffs, cited 2 *Maddock's Tr.* 401. 10 *Vesey*, 406. 1 *Har. Pr.* 128. 3 *Johns. Ch. Rep.* 60.

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WOOLSEY v LIVINGSTON.

S. Jones, contra.

THE CHANCELLOR. The bill sought to be revived partook of the nature of an original, as well as of a cross bill, for it sought relief not only against the mortgage which the defendants were seeking to foreclose, but also against the judgment and execution obtained by one of the defendants, as executor of *G. L.*, deceased. There does not appear any good reason why the suit should not be revived. The present representatives of *Woolsey* are interested in the subject matter of the suit sought to be revived, and the question is only whether they may revive the suit, or be driven to a new bill. The latter remedy may be attended with inconveniences not now anticipated, and it would appear to be immaterial, in point of interest and convenience, to the present defendants, whether they are called to answer to this bill of revivor, or to the original bill.

Demurrer overruled, and defendants ordered to answer in six weeks.

1821.

LEE v. PORTER.

C. M. LEE *against* PORTER and STILES.

P. gave a mortgage of land, the title to which was in *S.*, who was in possession thereof with *P.*; and *S.* if he was not present and assenting to its execution, afterwards treated it as a valid and subsisting mortgage, and voluntarily paid part of the money due on it: *Held*, in a suit by the mortgagee against *P.* and *S.*, for a sale and foreclosure of the mortgage, that *S.* was estopped from setting up his title to the premises, in avoidance of the mortgage.

A mortgage was given in 1814, by *P.* one of several occupiers of a lot of land, for a ratable proportion of money due on a former mortgage covering the whole lot, of which the premises in question were only a part, which former mortgage was given to *B.* in 1799, in renewal of a prior mortgage of the lot, in 1794, to *R.*, who had assigned it to *B.*: *Held*, that though *R.* claiming under the grantee of the patentee, whose title to the land had become forfeited to the State, by attainder, and therefore the mortgage by *P.* might be said to be without consideration; yet *P.* being fully apprised of the state of the title when he gave the mortgage, could not set up this defence against the plaintiff, a *bona fide* purchaser of the mortgage, for a valuable consideration; especially as he had, with the other occupiers of the lot, in a petition to the legislature, stated that they had satisfied the mortgage to *B.*, and on that ground the State had made an equivalent abatement of the sum, which they would otherwise have been obliged to pay to obtain the title from the State.

It *seems*, that the Court will not relieve against a mortgage, on the ground of an outstanding claim, which the mortgagor, for greater security to his title, had bought in, without any judicial investigation or decision on such claim, in a suit in which all proper persons were made parties, and were called on to bring forward their title.

An act of the legislature in 1818, reciting, that the title to certain lands were vested in the State by the attainder of *J. W.*, (in 1779,) and that such title had been perfected by the removal of incumbrances; and directing conveyances to be made by the Surveyor General to certain occupiers of the land so claimed, as forfeited, is not sufficient to devest the title of persons holding adversely, without a regular eviction in the ordinary course of law.

A deed, therefore, from the State, pursuant to such an act of the legislature, cannot be set up as a defence, to defeat a *bona fide* mortgage.

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Lee v. Porter.

June 13th.

THE bill stated, that the defendant *Porter*, being indebted to *Nathan Underwood*, on the 31st of *December*, 1814, in the sum of 600 dollars, payable in four equal annual instalments, the first payable, *June* 1st, 1815, executed a mortgage to him of part of lot No. 28, in *Freemason's* patent, in the county of *Oneida*, described by metes and bounds, and containing 85 acres and a half. That *P.*, before that time, had conveyed the land in fee, to the defendant *Stiles*, who, with *P.* was in possession, at the time of executing the mortgage, and knew and assented to the giving of the mortgage to the plaintiff. On the 8th of *February*, 1815, *U.* assigned the bond and mortgage, for the consideration of 600 dollars, to the plaintiff, who was then wholly ignorant of any defect in the title, and gave immediate notice of the assignment to *P.* That by some contract between *P.* and *S.*, the latter was bound to pay off the mortgage, and did pay to the plaintiff the three first instalments; but had refused to pay the last, alleging as a reason that his title under *P.* had failed, and he had been obliged to repurchase the land from the State. That when the mortgage was given, the land was held under a title from *Henry Platner*, to whom a mortgage on it had been given, which he had assigned to *John Bay*, who procured a renewal of the mortgage to himself; that on a bill filed by the claimants, under whom *S.* held, against *B.* for relief against the mortgage, it was decreed that no relief could be afforded againt it; and in pursuance of that decree, the said mortgage to *U.*, (who was assignee of the other mortgage to *B.*,) was executed, to secure a rateable proportion of the mortgage to *B.*, which included the whole of great lot No. 28, and which proportion was justly chargeable on that part of the lot possessed by the defendants. The plaintiff averred, that the mortgage to *B.* was, at the time of executing the mortgage to *U.*, a subsisting mortgage, and had not been satisfied, otherwise than

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by each owner of land in the lot securing his rateable proportion of the amount. That when the mortgage to *U.* was given, it was well known to the occupants on the lots, that the land was liable to the claims of the State, arising from the attainder of *John Weatherhead*, the original proprietor, which claim had since been released to the occupants, by the State, for an inconsiderable consideration, compared with the actual value of the land; and the hardship of paying off the mortgage to *B.* was made a special ground of application to the legislature for relief, and which was granted, because the occupants had paid, or were bound to pay off that mortgage. The bill *prayed* for relief, by decreeing the payment of the balance due on the mortgage, or that the premises be sold, &c.

The *answer* of the defendants admitted that *P.* executed a deed of the land, on the 14th of *February*, 1814, with warranty to S. who took possession, which he had held since that time. That *P.* gave the mortgage to *U.*, and that 150 dollars with interest remained due on it. That this mortgage was given in payment of the mortgage by *N.* and *S. Bumpus* to *Bay*. That when *P.* gave the mortgage to *U.*, he was informed by *U.*, that the State would never assert their claim to the lands, and that if the mortgage to *Bay* was paid, the title to the premises would be complete, and never afterwards be disturbed. That on this representation, *P.* executed the mortgage without the knowledge or consent of *S.*, nor did *S.* know that it had been given, until sometime after its delivery; nor was there any agreement between *P.* and *S.* as to the payment of it. That the payments made by *S.* on the mortgage were voluntary, and made to prevent a suit on the bond against *P.*, who is a very infirm old man, above the age of 80 years. That the defendants were not parties to the bill filed by *N.* and *S. Bumpus*, against *B.* and *U.*, for relief against the mortgage to *B.*——*S.* expressly denied that he knew of the mortgage by *P.*, when it was given, or that he ever assented to it, or made

any agreement to pay it; though he made the payments, with a view to assist *P.* That he was under no legal or equitable obligation to pay the mortgage; and as he was obliged to purchase the land from the State, and *P.* could not indemnify him, or reimburse what he had advanced, he refused to pay any thing more on the mortgage. *S.* denied that he ever promised the plaintiff to pay the residue of the mortgage, or that he ever received any consideration from him for such a promise; though it was his intention to have paid the last instalment before the State interfered, rather than *P.* should be sued. That he has no funds of *P.* in his hands, nor does he owe him, and if he is obliged to pay the residue, it will be an entire loss. That the premises were forfeited to the State, by the attainder of *Weatherhead*, and the title from *Platner* has wholly failed; that the State had asserted its title to the land, and the defendant *S.* as one of the occupants of the patent, received a deed, on the 27th *May*, 1818, from the Surveyor General, for the consideration of 355 dollars and 40 cents, according to the provisions of the act relative to the lot No. 28, in *Freemason's* patent, passed *April* 3d, 1818. *S.* admitted that he signed the petition with the other occupants in great lot No. 28, to the legislature, as stated in the bill, representing that some of the petitioners, with others under whom they claimed, had paid or secured the money due on the mortgage from *Bay*, and stating the mortgage and the suit in Chancery, and also certain trials between *John Thurman* and the occupants, and that the legislature remitted the interest on the sum at which the land had been appraised, on the grounds, as the defendant supposed, stated in the petition, &c.

The cause having been put at issue, several witnesses were examined, and much evidence taken on both sides, the material parts of which, so far as the proof varied from the facts admitted in the pleadings, are stated in the opinion delivered by the Court.

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Lee v. Porter.

Gold and *Sill*, for the plaintiff.

J. Kirkland, contra.

Where a person having or claiming title to land, sees another execute a mortgage of it to a third person, without disclosing his title, or assents, in any manner, to the validity of the mortgage, he will not be allowed, afterwards, to set up his title, to defeat such mortgage.

THE CHANCELLOR. 1. When the mortgage in question was given by *Porter*, the title to the mortgaged premises was in *Stiles*, the other defendant; but under the circumstances of the case, the defendant *S.* ought to be estopped from setting up his title in bar of that mortgage. The defendant *S.* in his answer, denies that the mortgage was given with his knowledge or assent; but there are two witnesses (*N. Bumpus* and *N. Underwood*,) who contradict the answer in this particular, and declare that the defendant *S.* was knowing and assenting to the mortgage, when it was given. It is also in proof, and is admitted by the answer, that the defendant *S.*, afterwards treated the mortgage as valid and subsisting, and that he paid to the present plaintiff, as assignee of *N. U.*, the original mortgagee, three out of four of the instalments, of which the payments were to consist. The defendant says, the payments were voluntary and gratuitous on his part; but whether they were voluntary, or made in pursuance of some contract between *S.* and *P.*, founded on a valuable consideration, is not material. It is sufficient, that the defendant *S.* assumed the mortgage to be valid, and if he was not present at the execution of it, he knew that *P.* (who resided on the premises with him,) had it in contemplation to give such a mortgage, and he gave to it his subsequent assent and ratification. When *U.* took the mortgage, we have reason to presume he dealt with *P.* as owner of the land; and the defendant *S.* suffered him so to act, without objection, and without disclosing his title. We have no evidence that *U.* knew of the title of *S.*, and upon settled principles of equity and justice, the defendant *S.*, who suffered *U.* so to deal, and who subsequently ratified the bargain, ought not now to be permitted to interpose his own title in avoidance of the mortgage. Another, and an equally

conclusive answer to any such objection is, that *Bay's* mortgage was a subsisting lien on the whole lot, and bound the land sold to *S.*, and the new mortgage was a continuation of the former lien, and so intended by an arrangement to which all parties acceded.

2. The only difficulty in the case arises from the objection of a want of consideration for the mortgage.

When the mortgage was given, the land was held under a title derived from *Henry Platner*, who claimed under a deed from *Allen M'Dougall*, the original grantee, and it continued to be so held, until the defendant *S.* took a title under the State, in *May*, 1818. This was almost twenty-four years after *Platner* had sold the premises in question to *N. & J. Bumpus*, and after the land had been held and occupied under that title. The mortgage in question was given for a rateable proportion of the money due on a former mortgage, covering the whole lot, and of which the premises were only a part. The former mortgage was given by the purchasers under *Platner* to *Bay*, the assignee of the original bond and mortgage given to *Platner*. The present mortgage of 1814, was thus a renewal of a mortgage given to *Bay*, in 1799, which was a renewal, in part, of the original mortgage given to *Platner*, in 1794; and if *Platner* had no title to lot No. 28, in the *Freemason's Patent*, when he sold to *N. & J. Bumpus*, in 1794, and took their bond and mortgage, the present mortgage may be said to want consideration, on being traced back to the original source of consideration; and this is the foundation of the present defence.

But there are several objections to this defence.

In the first place, the plaintiff appears to have been a *bona fide* purchaser of the mortgage in question, for a valuable consideration; and when the mortgage was executed, both the defendants were apprized of the condition of the title and of the claim of title said to exist in the State. The mortgage was given without surprize, imposition, or igno-

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rance, and under a sense of the peril to which *Platner's* title was exposed, when he took this and other mortgages from the settlers on the lot, for their rateable proportions of the prior mortgage to *Bay*, deducted from the sum due on the prior mortgage of 1,100 dollars, in consequence of this alleged prior and better title in the State. The defendant *P.* may, therefore, be considered as having given, and the defendant *S.* as having assented to or ratified the mortgage, with an assumption of the risk of the State claim. This inference is the more necessary, when we advert to the fact, that *U.* when he took the mortgage in question, never warranted the title under *Platner*, though he declared his belief that the settlers never would or could be disturbed by the State claim, and though he offered to warrant the *Platner* title, if the settlers would give renewed mortgages for the whole of the prior mortgage, including the costs of the Chancery suit stated in the pleadings, which offer was declined.

When one of several occupiers of land on which there was a mortgage, executed a mortgage of his part of the land, towards relieving the land from the prior mortgage, he cannot afterwards object, that such prior mortgage, was without consideration, and void, as he knew the true state of that mortgage when he gave his own mortgage.

Another objection to this defence is, that the defendants and five other settlers on the lot, presented a petition, under their signatures, to the Legislature, in *January*, 1818, praying for relief against the State claim, in which they stated, that they *had satisfied* the prior mortgage to *Bay*. That satisfaction consisted in giving the present and other renewed mortgages for their rateable proportions of the prior mortgage; and upon that representation the Legislature, by the act of *April* 3d, 1818, entitled "an act relative to lot No. 28, in the *Freemasons'* patent," remitted to them 13 years interest on the appraisement of 1804. The answer admits that the deduction was made upon the ground of hardship stated in the petition; and after that representation and consequent abatement, on the part of the State, the defendants would seem to be bound, in equity and good faith, to make good their representation, by a complete satisfaction of their rateable proportion of the mortgage to *Bay*. The State made an equivalent deduction on account of that mortgage, and

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the defendants may be considered as having had credit from the State for the whole amount of the mortgage now in question. There appears, then, to be injustice, if not a colour of fraud, in this defence.

Relief is not granted against a mortgage, on account of an outstanding claim which the mortgagor, for greater security to his title, bought in, without any judicial decision on such claim.

There is one remaining objection, which is, that the title of the State has never been established by any judgment at law. Before the plaintiff's mortgage is to be set aside, as being without consideration, the claimants under *Platner* ought to have been regularly evicted by due course of law, and in an action in which they might have had due opportunity to make their defence. The State derived title under the attainder of *John Weatherhead*, in 1779, and it had never asserted its claim, by any suit at law, from 1779 down to 1818, when the defendants applied to the Legislature for a release of their claim. Here was a lapse of 39 years, and for more than half that period the land had been held and occupied under an adverse title. Why was not this application made to the Legislature before the renewed mortgages in 1814? I doubt whether this Court has ever given relief against an incumbrance, in consequence of some outstanding claim which the debtor, for greater caution, chooses to buy in, before it has ever received a judicial determination and sanction, in a suit to which all proper persons were parties, or were called to put forward their title.

A recital in an act of the Legislature that the title to land was vested in the State by attainder of *J. W.* &c., is not sufficient to devest the title of a person holding adversely, without a regular eviction in the ordinary course of law.

The act of the 15th of *April*, 1817, (*sess.* 40. *ch.* 245.) does, indeed, recite, that the Attorney General had given a certificate, "that the title of certain lands in the *Freemasons'* patent, in the county of *Oneida*, was vested in the state by the attainder of *John Weatherhead*;" and it also recited, that "the title of the State in said lands had since been perfected by removing incumbrances." The act of *April* 3d, 1818, (*sess.* 41. *ch.* 81.) also directed conveyances to be given to the defendants, and the other five petitioners, as being occupants of lot No. 28, in *Freemasons'* patent, forfeited by the attainder of *John Weatherhead*." But

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neither that recital, nor that declaratory averment, was sufficient to devest the persons holding under *Platner*, without a regular eviction, founded on a fair discussion and decision, in the ordinary course of justice. The plaintiff has an undoubted right to insist, that his claim as a mortgagee is not forfeited and lost by the mere force and effect of such a recital and declaratory clause. It cannot affect or impair that right; and so the doctrine on this point was declared by the Supreme Court, in *Jackson* v. *Catlin*; (2 *Johns. Rep* 248.) and the judgment in that case was afterwards affirmed in the Court of Errors.

The deed set up by the defendants may be considered in the light of an attornment to a stranger, and a recognition of his right, in order to defeat the mortgage; but I am of opinion that the defendants cannot be permitted in this case to avail themselves of such a defence. I shall, consequently, decree, that they pay the last instalment of 150 dollars, with interest from the 1st of *June*, 1817, and the costs of this suit to be taxed, or that the mortgaged premises be sold.

Decree accordingly.

FULLERTON, an infant, by VAIL, her guardian,
against
JACKSON and others, executors of FULLERTON.

This Court will not sustain a suit by an *infant*, for the *interest* due on a legacy, directed by the will of the testator, to be applied to her education, when the amount is less than *fifty dollars*, and the party may sue the executor in a Court of Common Pleas.

June 19th. BILL for two years interest, due on a legacy of 200 dollars, payable when the infant came of age, which in-

terest the testator directed, by his will, to be applied to her education. The infant was of the age of nine years, and sued by her guardian. The defendants admitted assets, and that the interest being 28 dollars, was due, which they were ready to pay, as the Court should direct.

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Chattle, for the plaintiff.

Case, for the defendants.

An objection was raised, that the sum was too small for the jurisdiction of this Court.

THE CHANCELLOR. Executors are not suable before a Justice of the Peace, for a legacy. They are expressly excepted in the statute from the jurisdiction of the Justice, as to actions against them. But this suit might have been brought in the Court of Common Pleas of the county where the defendants reside, under the 19th section of the act entitled "an act concerning executors and administrators, and the distribution of intestates' estates." For a demand under 50 dollars, the plaintiff ought to have sued there; it is too expensive, and consequently oppressive, to sue in this Court, except in special cases, for so small a sum as 28 dollars. This point was fully examined in the case of *Moore* v. *Lyttle*. (4 *Johns. Ch. Rep.* 183.) I shall, therefore, dismiss the bill, but without costs and without prejudice.

Bill dismissed.

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FULLERTON, an infant, &c. *against* JACKSON and others, *executors*, &c.

A *grandfather* has no right, under the statute, by his will, to appoint a guardian to his grandchild. But if he devises land to his grandchild, and directs the rents and profits thereof to be applied by his *executors* to the education of such grandchild, during his minority, the executors, not the guardian appointed by the surrogate, are entitled to apply the *rents* and *profits*, according to the direction of the will.

The Court will not, therefore, direct the executors, on a bill filed by the infant and his guardian, to pay over the rents and profits to the guardian, but leave them in the hands of the executors, until the infant comes of age.

June 13th. BILL for an account of the rents and profits of two acres of land, devised to the infant by his grandfather, with directions in the will, that "the rents and profits be appropriated, with such other moneys as may be thought necessary by my executors, for the expense of his education, until he arrives to the age of sixteen years; and then to be at the election of my executors whether to give him education to get a living, or learn him a useful trade; and when he arrives to the age of twenty-one years, I do also order that he shall be put into the possession of the above lot, and be paid 200 dollars," &c. The will, in a subsequent part, added, "that my wearing clothes be applied in the most prudent manner to the expense of my grandson *William*, in clothing him; and that my executors be his guardian, and direct his bringing up and education, as in their judgments shall appear proper." The bill prayed, that the executors account for the rents and profits of the two acres, being 40 dollars a year.

The defendants admitted the receipt of the rents and profits for three years, at 40 dollars a year, and that they were ready to apply the same, as might be directed, for

his education; but they insisted that they are entitled, by the will, to appropriate the same towards his education, and not to pay over the whole to the guardian appointed by the surrogate, and who claimed it.

Chattle, for the plaintiff.

Case, contra.

THE CHANCELLOR. A grandfather has no right, under the statute, to appoint, by will, a guardian to his grandchild; but, as Lord *Hardwicke* observed, in *Blake* v. *Leigh*, (*Amb.* 306.) he may give his estate on what conditions he pleases. There are instances where a grandfather has given his estate to his grandchild, and appointed guardians of his estate and person; and if the father did not submit to the will, the Court has made the father's opposition work a forfeiture of the son's estate.

In the present case, the testator intended that the rents and profits of the land devised during the minority of the grandson, should be appropriated by the executors towards his education. He had a right to annex that condition to the gift; and I do not see that I am required by any principle to call those rents and profits out of the hands of the executors, and place them under the discretion of the guardian. The defendants have no control of the infant, but those rents and profits must be left to their control; and if the guardian will not allow them to appropriate the same in such manner as they shall deem best towards the education of the infant, he must be educated with other resources; and the defendants will be responsible to the infant, when he comes of age, for those rents and profits, with interest thereon.

Bill dismissed without costs.

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SPADER and others *against* DAVIS and HADDEN.

A judgment creditor, who has issued an execution, which has been returned *nulla bona*, acquires a priority of right to the property of his debtor, in the hands of a trustee, and any payments made by the trustee to the debtor, after a bill filed by such judgment creditor, or after notice of such right, are in his own wrong, and of no avail against such creditor.

June 28th. BILL filed 25th of *January*, 1820, stating that the defendant *D.*, being indebted to the plaintiff *S.* and others, stopped payment, on the 26th of *June*, 1819; and being possessed of a large stock in trade, and debts due him, he transferred the same to the defendant *H.*, for fraudulent purposes, and to avoid payment of his debts. That the plaintiffs obtained judgments at law against the defendant *D.*, in *January*, 1820, and issued writs of *fi. fa.* which were returned *nulla bona*. *Prayer*, for discovery and relief.

The answer of the defendant *H.*; filed 24th of *March*, 1820, admitted the bankruptcy of *D.*; and stated, that he was then indebted to the defendant *H.* the sum of 2,386 dollars and 40 cents, and that his stock in trade was estimated at 5,613 dollars and 37 cents. That to secure to *H.*, *D.* sold to him goods to the amount of 4,800 dollars, and on or about the 26th of *June*, 1819, assigned over the surplus to *H.*, in trust, to pay all the creditors, on condition that they would release and discharge him within thirty days. That, by another assignment, dated *July* 29, 1819, on like trusts, *H.* was authorized to sell the goods, and convert the same into cash, on the like trusts. That the defendant *H.* sold the surplus, at auction, on the 18th of *August*, 1819, for the net sum of 1,486 dollars and 7 cents. That the trusts, in the assignments, were to become void, if the creditors, by a given day, omitted to come in and accept, and discharge *D.* That the creditors did not come in, and the assignments therefore became void. That *H.* held the mo-

neys aforesaid, together with other moneys assigned, in like manner, and amounting in the whole to 2,207 dollars and 17 cents, in trust for *D.* That *H.* had paid *D.* of those moneys, from time to time, leaving 799 dollars and 33 cents on hand, at the time of the answer. The answer denied all fraud, and admitted the other facts charged.

The answer of the defendant *D.*, filed *May* 31, 1821, was to the like effect. He stated, that the sum of 799 dollars and 33 cents, being the balance of the trust moneys remaining with *H.*, were paid over to him, by *H.*, on the 3d of *May*, 1820. It appeared, also, by one of the schedules annexed to the answer of *H.*, that he had in hand, on the 29th of *January*, 1820 when his appearance to the suit was entered, 974 dollars and 92 cents, and that of that sum, 175 dollars and 39 cents were paid over to *D.*, or to his order, before the answer of *H.* was put in.

The case was submitted to the Court, upon the bill and answer.

Haight, for the plaintiffs. He stated the following points:

1. Under an assignment of property for creditors, to become void, if the creditors do not come in and release the assignor within a limited time, the assignee cannot surrender the property to the assignor, until the *cestui que trusts* have renounced the benefit of the trust.

2. If the assignee could surrender the property to the assignor, in order that he might declare further trusts, in relation to the same, the assignment of the 29th of *July*, 1819, was such further declaration of trust, under which the assignee could not surrender the property to the assignor, until the *cestui que trusts* renounced the benefit of the trust.

3. The power of sale, contained in the assignment of the 29th of *July*, 1819, could not be well executed, until the *cestui que trusts* came in and released, or, at least, until after the full expiration of the time limited for the creditors to come in.

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4. The assignee, at all events, ought to be decreed to account for the nett proceeds of the property assigned, which were in his hands, at the time of filing the bill in this cause, with costs.

Anthon, contra. He made the following points: 1. The assignments required no renunciation on the part of the *cestui que trusts*, because their interest in the property assigned, depended on a condition precedent, viz. a release by all the creditors of the assignor; and until that event took place, they had no interest: and as no such release was executed, the property assigned, by a *resulting trust*, belonged to the assignor.

2. The power of sale, in the assignment of the 29th of *July*, 1819, so far from requiring a renunciation of the *cestui que trusts*, to set it up, was, by the terms of that assignment, to be in full force, in case of their default, in fifteen days after the date of the assignment.

3. The assignee ought to be decreed to pay to the plaintiffs, the amount in his hands, at the time the bill was filed. He had no right to hold against the assignor; and the plaintiffs ought to have obtained an injunction. If the assignor had brought a suit at law, the pendency of proceedings in this Court, on the part of the plaintiffs, would have been no bar to his recovery.

4. All fraud having been fully denied by the answer, the plaintiffs have no equity against the defendants, but ought to resort to a Court of law.

THE CHANCELLOR said, that the plaintiffs, at the time of filing their bill, had acquired, as execution creditors at law, a priority of right, valid in equity, to the trust moneys belonging to the defendant *D.*, and in the hands of the defendant *H.*, and that all payments of the same, by *H.* to *D.*, subsequent to the filing of the bill, containing notice of that

right, and of their claim in pursuance of it, were made in his own wrong. The doctrine in the cases of *Brinckerhoff* v. *Brown*, and of *M'Dermut* v. *Strong*, (4 *Johns. Ch. Rep.* 671. 687.) he considered as applying and governing the case.

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It was accordingly decreed, that the defendants, or one of them, within thirty days, pay to the solicitor for the plaintiffs, the 974 dollars and 72 cents, with interest, from the 29th of *January*, 1820, and the costs of the suit, or that execution issue, &c. and that the sum, when received, be paid to the plaintiffs, rateably, in proportion to the amount of their judgments.

Decree accordingly.

J. MONELL and others *against* G. MONELL and others.

If two trustees, executors, or guardians, join in a receipt for money, it is presumptive evidence that the money came equally into the possession, or under the control, of both; and there must be direct and positive proof to rebut the presumption. The *answer* of the defendants is not evidence sufficient for that purpose, or to avoid or contradict the language of the receipt.

Where, by any act or agreement of one trustee, or executor, money gets into the hands of his co-trustee, or co-executor, both are answerable for it.

Where the responsibility of a trustee or guardian, or that of his sureties, becomes precarious, the Court, on a bill filed by the infants, for that purpose, will order the moneys in the hands of the trustee or guardian, to be brought into Court, to be put out for the benefit of the parties interested, or that further and sufficient security be given by the trustees or guardians.

THE bill, filed by five of the children of *James Monell*, three of whom were infants, stated, that their father died *January* 3d, 1814, intestate, and seized of a large real and

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personal estate, and that they and their three brothers and three sisters, whom they named, were his heirs at law. That on the 4th of *February*, 1814, letters of administration on their father's estate, were granted by the surrogate of *Orange* county, to the defendant, *George Monell*, and to *John W. Nicoll*, and *Samuel Monell*, who took upon themselves the administration of the estate. That the surrogate, on the 1st day of *March*, 1814, appointed the defendant *G. Monell* and *Peter Milliken*, guardians for the plaintiffs *George*, *Hiram*, and *Gabriel*, who were then under fourteen years of age, and of the other two plaintiffs, who were then above fourteen and under twenty-one years of age, by their choice and election. That the guardians gave bonds, with *James R. Boyd* and *Philip Miller*, the other two defendants, as their sureties, for the faithful performance of their duties as guardians, and to render account, &c. That the said guardians, on the 1st of *March*, 1814, received for each of the plaintiffs, out of the personal estate of their deceased father, 291 dollars and 88 cents. That the defendant *G. M.*, one of the guardians, became insolvent, about the 1st of *May*, 1817, and was discharged from all his debts under the insolvent act, and still is insolvent. That *J. R. Boyd*, one of the sureties has since become involved in debt, and all his property has been sold by the sheriff to pay his debts. That the defendants *G. M.* and *Milliken* have held the said moneys since they were received by them, and the plaintiffs had applied to them for an account and payment, according to their respective rights, without effect. The bill further stated, that in a suit for partition, between the plaintiffs and their brothers and sisters, commenced in *September* term, 1814, in the *Orange* Court of Common Pleas, of the lands of their deceased father, it was adjudged that the land should be sold; and a sale thereof having been made accordingly, the Court of C. P. in *September*, 1818, ordered, that after deducting the costs, the residue of the moneys arising from the sale of the land, being five thousand seven hundred and

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five dollars and seventy-eight cents, should be paid to the parties in the suit, according to their respective rights. That the said Court, in *September*, 1818, also directed the commissioners who had been appointed for the sale to pay over to the defendants *G. M.* and *Milliken*, (who had been appointed by the Court, in that suit, guardians of the plaintiffs, who were not then of age,) the sum of 518 dollars and 70 cents, for each of the plaintiffs, and which order was directed to be entered as of *February* term of 1815, of that Court. That in *May*, 1815, the commissioners actually paid to the defendants *G. Monell* and *Milliken*, the sum of 518 dollars and 78 cents, for each of the petitioners. That when *G. M.* and *Milliken* were appointed guardians by the Court of C. P., they executed a bond in the penal sum of 5000 dollars, conditioned for the faithful discharge of their trust, and to account in all Courts, &c. when required; and *Hiram Weller* and *James R. Boyd* executed the bond as sureties. That since the payment of the said moneys to the *G. M.* and *Milliken*, two of the plaintiffs had come of age, and had received the greater part of the money due to them, and have received security for the residue, and do not prosecute this action for any part thereof. The other plaintiffs alleged, that since the giving of the said bond, *Weller* and *G. Monell*, the sureties, had become wholly insolvent, and had been discharged under the act; that *Boyd* was embarrassed with debts, and *P. Miller's* property, as they were informed, did not exceed four or five thousand dollars, &c. That the said guardians have held the moneys of the plaintiffs, since *May*, 1815; and though called on to account, &c., they had refused, &c. The bill *prayed* that the defendants might be decreed to account at large, and particularly for the moneys received as guardians appointed by the surrogate, and as guardians appointed by the Court of C. P., and to pay over the same to the plaintiffs, or further to secure the same, as the Court might direct, &c.

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The bill was taken *pro confesso*, against *Miller* and *Boyd*. *G. Monell* and *Milliken*, in their answer, filed *July* 3d, 1820, admitted the granting of letters of administration, and the appointment of them as guardians, as stated in the bill. *G. M.* admitted that he received 291 dollars and 88 cents for each of the plaintiffs. The defendants denied that any part of the moneys ever came to the hands of *Milliken*. They admitted that *G. M.* became insolvent about the 1st of *May*, 1817, and had been discharged under the act, and was still insolvent. That the shares of the plaintiff in the personal estate of the intestate had remained with *G. M.* since *March*, 1814, having come to his hands, *as administrator*. That the plaintiffs had applied to the defendants for a settlement of the personal property; but that the plaintiffs, *John* and *James Monell*, had lately come of age; and the defendants have since been ready and willing to come to a settlement, on being allowed a reasonable compensation for their services in relation to the personal estate, but that such allowance was refused, and interest on the moneys claimed; and they insisted that they were entitled to such compensation, and ought not to be charged interest; and on those terms they were ready to settle and account with the plaintiffs for their respective proportions, &c. They insisted that they were not liable to account, until the plaintiffs, who were infants, had come of age.

They admitted the judgment in partition, and sale of the lands, and the payment of the money to them, and their appointment as guardians by the Court of C. P. and security given by them, as stated in the bill. But they said, it was the understanding and agreement of the parties to that suit, that the real estate should be sold on a credit, and as to the proportions of the plaintiffs, a credit was to be extended to about the time of their coming of age; that, accordingly, a part of the purchase money, equal to the shares of the plaintiffs, was secured by a mortgage, executed to the de-

fendants, and delivered to *G. Monell*; and they denied any payment of the moneys to them, by the commissioners, in any other way, than by delivery of the mortgage to *G. M.* They admitted the insolvency of *G. M.*, and *H. Weller*; but they knew nothing of any change in the circumstances of *Boyd*; that the defendant *Milliken* had ample property, and would be fully able to satisfy all the claims of the plaintiffs, when they should arrive at full age. The defendant *Milliken* answered, that he had never received as guardian, &c. any part of the proceeds of the personal or real estate, but had actually paid, out of his own property, large sums of money to the plaintiffs.

Proofs were taken in the cause, which were brought to a hearing, and argued by *Betts*, for the plaintiffs, and *Fisk*, for the defendants.

For the plaintiffs, it was contended: 1. That both the defendants, *G. Monell*, and *Milliken*, as guardians, are liable to account for the amount of the moneys received by them, to the plaintiffs. The first inquiry, then, is whether *Milliken* did, in fact, receive the money of the plaintiffs. Though the answer was extremely inconsistent and unsatisfactory on this point; yet, for the sake of the argument, it was admitted that it explicitly asserted the negative. The defendants, however, claim compensation for their services, as *guardians*, to which they would not be entitled, but on the ground that they both performed the duties of guardians, in receiving the money and putting it out to the best advantage of the heirs. The assertion of *M.*, in one part of the answer, that he received the money as *administrator*, is contradicted by another part of it, in which he admits that he received it as guardian. The schedule, also, annexed to the answer, exhibits a charge of commission in the account by both as guardians; and one of the exhibits in the testimony proves the same fact. This exhibit may be urged as conclusive proof, at least, until directly contradicted by evidence on the part of the defendants. The *receipt*, more-

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over, given by the administrators for the proceeds of the personal estate, is signed by both of the defendants as guardians. It was incumbent on *Milliken* to prove, by other testimony than his own, that *Monell* received the money, in the first instance. The evidence in the cause, as it stands, must prevail against the answer, admitting, even, that it was proof for the defendants, and contained an unqualified and uniform denial of the fact; for the defendant cannot, by his answer only, avoid the effect of a writing under his own signature. (*Phillips' Ev.* 602.) Any matter set up in contradiction to a written receipt must be offered as evidence in avoidance of it. If the defendants had answered that the money was counted to them both, but was taken by *Monell* alone, the latter part of the answer would be a distinct fact in avoidance of the fact previously admitted. (*Hart* v. *Ten Eyck*, 1 *Johns. Ch. Rep.* 162. and note.)

Again; bonds have been executed by both of the defendants to each of the plaintiffs, for the faithful performance by them both of their duties as guardians. It is not, therefore, sufficient to acquit *M.*, that he has fully accounted, when the undertaking is for himself and *G. Monell.* (3 *Johns. Cases*, 52.) In regard to the proceeds of real estate, there is also a receipt to the commissioners signed by both defendants, as guardians, and the whole transaction shows that they acted jointly.

The fact alone of joining in receipts for the money, in the absence of other proof, renders each defendant liable for the whole amount. A rule once prevailed in *England*, which was recognised in *Pennsylvania*, (1 *Dallas* 311.) that either of two executors, who had executed receipts for assets, was liable to the legatee, for the amount only actually received by him. But that rule is exploded, and the doctrine now established at law and in equity, is, that if assets come to the hands of one executor only, but both join in a receipt for them, both are equally

liable to legatees and creditors. (2 *Bro. C. C.* 116. 1 *P. Wms.* 241. 1 *Salk.* 318. 7 *East*, 246.) The common law liability of a guardian and executor is substantially the same. Both are trustees, and are considered as performing their trust gratuitously. (1 *Johns. Ch. Rep.* 84. 510. 527. 620. 303. 281.) Though the question has been frequently agitated, whether one executor or trustee shall be answerable for the neglect or malfeasance of the other, it is well settled, that if two trustees join in a receipt for money, so as not to distinguish what has been received by the one and what by the other, each shall be answerable for the whole. (2 *Fonbl. Equ. B.* 2. *ch.* 7 *note k. Gill* v. *Attorney General, Hardres*, 314. 4 *Vesey*, 596. 11 *Vesey*, 252. 333. 7 *Vesey*, 186.)

As to the objection, raised by the defendants, in their answer, that they are not bound to account to the plaintiffs who are infants, before they come of age, the proposition is too unreasonable to merit a serious answer. From the earliest times in the history of the law, guardians have been held liable during the minority of their wards; (*Co. Litt.* 89. *Fitzh. N. B.* 119. *Cro. Jac.* 218. 640.) and this Court has jurisdiction, on the ground that the guardian is a trustee. (2 *P. Wms.* 119. 1 *Johns. Ch. Rep.* 100.)

The only remaining question is as to the remedy, or the extent to which the defendants are liable. We contend that the moneys due to the plaintiff, who are of full age, ought to be paid to them forthwith; that the shares of the infant plaintiffs be paid into the Court, to be placed out at interest, under its direction; or that the defendants give further and satisfactory security for the money; and we claim, also, compound interest and costs. (1 *Johns. Ch. Rep.* 84. 281. 303. 510. 527. 4 *Johns. Ch. Rep.* 281. 620. 2 *Fonbl. Equ. B.* 2. *ch.* 7. *note k.* 7 *East*, 246. 2 *Madd. Ch.* 177. 420. 425. 3 *Johns. Cases*, 59. 1 *Johns. Ch. Rep.* 3. 100. 565. 11 *Vesey*, 462. 18 *Vesey*, 16.)

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For the defendants, it was contended, 1. That the defendant *Milliken* never having received any part of the proceeds of the property, was not liable to the plaintiffs. Trustees have all equal powers and cannot, like executors, act separately, but must join in all conveyances, receipts, &c. It would be, therefore, unjust to make one liable for money received by the other. In *ex parte Parsons*, (*Ambler*, 219.) Lord *Hardwicke* observed, that "if trustees join in giving a discharge, and one only receives, the other is not accountable, because his joining in the discharge was necessary." The defendants explicitly deny that *Milliken* ever received any part of the money, and the allegation is not contradicted by the evidence. They may have joined as guardians, in giving receipts; but there is no evidence that any of the money ever came to the hands of *Milliken*. In regard to the proceeds of the real estate, the mortgage, it is shown, was delivered to *Monell*. (*Comyn's Dig. Account, A.* 3. *Fonbl. Equ.* 180. *sec.* 5. *note.*)

2. That the defendants are not liable to account to the plaintiffs, who are still infants. The Court are liberal in regard to trustees, so as not to deter men from acting for others. (*Ambler*, 219. 3 *Atk.* 444.) There is no evidence of any misconduct on the part of *Milliken* that ought to induce the Court to remove him, or compel him to account, at this time.

3. Even, if he should be considered as liable for the money, his property is amply sufficient for the security of the plaintiffs. The full amount of the demands of the plaintiffs is not equal to one half of his estate. That the other guardian and one of the sureties are insolvent cannot be imputed to him as a fault. The plaintiffs have entirely failed to show that *Boyd*, the other surety, was insolvent; nor is it pretended that *Miller* is either embarrassed or insolvent. It is true, that both of the defendants executed the bonds with sureties for the due performance of their

trust. But it is a new doctrine, that this renders one trustee liable for moneys received by the other; and if it is to prevail, no prudent man would incur the responsibility, by executing such a bond. The power of this Court to direct further security is not questioned; but it is denied that any necessity exists, in the present case, for the exercise of that power.

THE CHANCELLOR. The bill is filed by two of the adult, and by three of the infant children of *James Monell*, deceased, against the defendants, *G. Monell* and *P. Milliken*, as guardians, for an account of the real and personal estate.

1. As to the personal estate, the answers admit, that on the 1st of *March*, 1814, 1459 dollars and 40 cents was received by the defendant *G. M.* as part of the personal estate, and that each plaintiff was entitled to one-fifth, or 291 dollars and 88 cents. But the answers aver, that the money came to his hands, as *administrator*, and they admit, that he, with two other persons, were administrators of the personal estate of *James Monell*, deceased. The answers deny that any part of that money ever came to the possession of the other guardian, *P. M.* The question on this part of the case is, whether the defendant *P. M.* be chargeable with this money, as the defendant *G. M.* is insolvent, and has been discharged under the insolvent act.

The testimony in contradiction to the averment, that no part of that money ever came to the possession of the defendant *P. M.*, and that it was received by the defendant *G. M.* in his character of *administrator*, is derived partly from the answers themselves. The schedule No. 1, annexed to the answers, is signed by the defendant *G. M.*, and it admits the receipt of the 1459 dollars and 40 cents, for the plaintiffs, by him, "as guardian," and both those defendants pray, that this schedule may be taken as part of their answer; and in schedule No. 2, annexed to the

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answer, and which they pray to have taken in like manner, the defendants claim a commission of five per cent. on the distribution of the above sum, "as guardians;" and they charge, "as guardians," that commission to each plaintiff, for his one-fifth part of that sum, being 291 dollars and 80 cents.

We have, likewise, a receipt (exhibit A,) signed by both of those defendants, "as guardians," and dated the 24th of *May*, 1815, in which they acknowledge to have received of the two other administrators, (*John D. Nicoll* and *Samuel Monell*,) 1459 dollars and 40 cents, in full of the dividend due from the estate, on settlement, to the five plaintiffs.

The acknowledgments contained in the schedules annexed to the answers, and in this receipt, appear to me to place beyond all doubt the responsibility of the defendant *P. M.*, as one of the guardians, for the money so admitted to have been received; and they prove that the pretence in the answer that the money came exclusively to the hands of the defendant *G. M.*, in his character of *administrator*, is utterly groundless. It is further to be observed, that the defendant *P. M.* has furnished no evidence to counteract the inference necessarily resulting from the receipt, that the money came as much into his possession or under his control, as into the possession or under the control of his co-guardian.

2. Those defendants were also appointed guardians by the Court of Common Pleas, in *Orange* county, on a proceeding in partition and a sale of the real estate of *James Monell*, deceased; and, in that character, they received for the plaintiffs, 2593 dollars and 50 cents, being the sum of 518 dollars and 70 cents, for each plaintiff. This money was received on the 6th of *May*, 1815, by the defendants, in a mortgage taken by the commissioners appointed by the Court under the proceeding in partition, and assigned to them. The answers state, that the mortgage was drawn by the purchaser, in favour of the defendants, and de-

livered over to the defendant *G. M.* But the exhibit C. proves, that the mortgage was taken to, and in the name of the commissioners, for the sum of 4381 dollars and 65 cents, payable in one, two, and three years; and that it bore date the 20th of *April*, 1815. The proportion coming to the plaintiffs was covered by this larger sum. The mortgage was registered on the 26th of *May*, 1815, and was assigned to the defendants, for 3781 dollars and 65 cents; and then it was assigned by the defendant *P. M.* to the defendant *G. M.*, on the 7th of *February*, 1816, and cancelled by the latter, by an acknowledgment of satisfaction, on the 12th of *April*, 1816. Why did one guardian assign over his right and interest, as a guardian, in the mortgage, to his co-trustee, unless it was to enable the other to collect and appropriate the amount of the mortgage to his own use, as he shortly afterwards did, and then became insolvent? There is no colour, in law or justice, for the pretence that the defendant *P. M.* can be exempted from responsibility for the loss of that mortgage debt due to the plaintiff, when he thus voluntarily relinquished his interest and possession, as a trustee, to his co-guardian. The presumption is, that he did it to accommodate his companion with the use of the money, for his own private purposes. We have, likewise, in *exhibit* B., a receipt, signed by the two defendants, "as guardians" for the plaintiffs, dated *May* 6th, 1815, in which they acknowledge to have received of the commissioners in partition, 2593 dollars and 50 cents, being 518 dollars and 70 cents for each of the plaintiffs.

In short, the proof is decisive, and of the highest character, to show that the defendants were equally and jointly concerned, as guardians, in the receipt and control of the moneys so received for the plaintiffs, both from the real and personal estate; and the solvent guardian cannot now be permitted to shift the responsibility from himself, and place it exclusively upon his insolvent partner.

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Lord Thurlow, in the case of *Sadler* v. *Hobbs*, (2 *Bro.* 114.) took it to be a clear rule, that where by any act, or any agreement of the one party, money gets into the hands of his companion, whether a co-trustee or a co-executor, they shall both be answerable. Where one executor puts money into the hands of his companion, he shows he had it in his power to secure it, and that his companion, for some reason, was permitted to obtain the possession of the money. He referred, among other cases, to that of *Gill* v. *Attorney General*, (*Hardres*, 314.) in which *Hale*, Ch. B. said, that, if by agreement between two executors, one is to receive and intermeddle with such part of the estate, and another with such a part, each shall be answerable for the whole.

The doctrine in that case perfectly applies to the disposition of the mortgage; and the defendant *P. M.*, "for some reason" not explained, by a formal act, transfers his interest in and control over the mortgage debt, to his companion, to be by him appropriated, dissipated, and lost.

The joining in the receipt of the personal property, is presumptive evidence that the money came equally into the possession or under the control of both the trustees, and it would require direct and positive proof, to rebut that presumption. Lord *Eldon*, *in Brice* v. *Stokes*, (11 *Vesey*, 324.) declared, that such a presumption arose from the circumstance of joining in the receipt, and that it was incumbent upon the trustee to destroy the presumption by proof, if he meant to exonerate himself. There is no proof in this case, to counteract the language of the receipts. There is no evidence, out of the joint answer of the defendants, that the moneys did not come to the hands of both of them; and I apprehend, that the answer is no evidence of such a fact set up in avoidance of, and in contradiction to, the language of the receipt signed by the party himself. And if the money did not, in fact, come to the hands of the defend-

ant *P. M.*, yet if it was paid to his companion, *with his assent and direction*, he is responsible for the misapplication of it.

"If a receipt," according to Lord *Redesdale*, *in Joy* v. *Campbell*, (1 *Sch. & Lef.* 341.) "be given for the mere purposes of form, then the signing will not charge the person not receiving. But if it be given under circumstances purporting that the money, though not actually received by both executors, was under the controul of both, such a receipt shall charge; and the true question in all those cases seems to have been, whether the money was *under the control of both executors*: If it was so considered by the person paying the money, then the joining in the receipt by the executors, who did not actually receive it, *amounted to a direction to pay his co-executor*; for it could have no other meaning; he became responsible for the application of the money, just as if he had received it." The Chancellor, also, (*p.* 344.) referred to a MS. case of *Cansey* v. *Barsham and Hayden*, decided by Lord *Hardwicke*, in 1753, in which it was declared, that a trustee was only answerable for what he receives, or applies, but *H.* had made himself liable by joining in the deed, by which the purchase money was left in the hands of the purchaser, for payment of the legacies. He was responsible for the deficiency of *B.*, (who was in doubtful circumstances,) though he had received none of the assets, *because he had joined in the direction to pay.*

So in the case of *Brice* v. *Stokes*, already cited, Lord *Eldon* charged a trustee, though he did not receive the money, under the circumstances, he having joined in the receipt, and permitted his co-trustee to keep and act with the money contrary to the trust. This is precisely the present case.

Lord *Alvanley*, in *Harvey* v. *Blakeman*, (4 *Vesey*, 596.) took great pains to extract some principle from the cases. He held that one executor in trust was not answerable for

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the receipts of the other, merely by permitting the other to possess the assets, and by joining in acts *necessary* to enable him to administer. But if he goes further, and concurs in the application of the assets, he was liable. And from the doctrine in *Crosse* v. *Smith*, (7 *East*, 246.) and in the other cases, which have been referred to, it may be laid down as a principle, that if two guardians or other trustees join in a receipt for moneys, it is *prima facie*, though not absolutely conclusive, evidence, that the money came to the hands of both; that one trustee may show, by satisfactory proof, that the joining in the receipt was necessary, or merely formal, and that the moneys, in fact, were paid to his companion; that without such satisfactory proof, he must be liable to the *cestui que trust*. and that, if the moneys were, in fact, paid to his companion, yet if they were so paid by his act, direction, or agreement, and when he had it in his power to have controlled or secured the money, he is, and ought to be responsible.

If two trustees join in a receipt for money, it is *prima facie* evidence, that the money came to the hands of both.

But if one trustee clearly proves, that his joining in the receipt was necessary or merely *formal*, and that the money was, in fact, paid to his companion, without his direction or consent, and it was out of his power to control or secure the money, he will not be responsible.

In the present case, there is not the least shadow of pretence for exempting the defendant *P. M.* from answering for the proceeds of the real estate belonging to the plaintiffs who are infants; and the plaintiffs who are adults have been already secured in their proportion of these proceeds, and they do not seek any relief in this suit on that branch of the case. With respect to the proceeds of the personal estate, there is no proof to countervail the inference arising from the receipt and the schedules annexed to the answer. And if the money did, in fact, go exclusively into the hands of the defendant *G. M.*, the presumption is, (and, as Lord *Redesdale* observed, the joining in the receipt appears to have no other meaning than this,) that it was paid under the direction of the defendant *P. M.*, and that he voluntarily concurred in such an appropriation of it, when he had the money equally within his own power and control.

The plaintiffs who are adults are, then, entitled to a de-

cree, for the payment, by the defendants *G. M.* and *P. M.*, of the 291 dollars and 88 cents, due to each of them respectively, with interest thereon, from the 24th of *May*, 1815. As to the like sum with interest, due to each of the three infants, and as to the sum of 518 dollars and 70 cents, due to each of the three infants, with interest from the 20th of *April*, 1815, another question arises. The defendant *P. M.* is answerable, as guardian, for these sums, and if they were perfectly safe and secure in his hands, he would not, in an ordinary case, be called upon for the money, until the infants came of age. But if the credit of him, or the sureties, is doubtful or precarious, so as to raise great fear as to the ultimate safety of the moneys, it is then the course of the Court, to allow the moneys to be called in, for and on behalf of the infant, or to require better security. In this case, *G. M.*, one of the guardians, has failed, and been suffered by his co-guardian to appropriate and misapply the trust moneys. The other guardian remains solvent, with depreciated property, and one of the sureties to the guardianship of the personal estate is worth little or nothing. One of the sureties to the guardianship, respecting the proceeds of the real estate, has failed, and the other is the same surety who, as I observed before, is worth little or nothing.

Guardians or trustees, may be called to account by infants, and be required to bring the trust moneys into Court, and to give further security to account, when the infants come of age.

Under these circumstances, of a complete insolvency of one guardian and one surety, of the very slender and doubtful credit of another surety, of the considerable length of time that the minorities of the plaintiffs will continue, and of the heedless manner in which the only solvent guardian has suffered his companion to deal with the property, I am of opinion, that the defendant *P. M.* ought to be required to bring the moneys due to the infant plaintiffs into Court, to be put out under its direction, or to give further and sufficient security, to be approved of by a master, to account for the principal and interest to the infants, when of age.

It is too plain a proposition to stand in need of authorities,

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(though the counsel for the plaintiffs have cited some to the point,) that the infant ward may come into this Court, by his next friend, and call his guardian to account, or require him to give better security, if the state of the case should call for it. Lord *Redesdale* said, in *Blake* v. *Blake*, (2 *Sch. & Lef.* 26.) that according to the modern decisions and present practice, where there are no debts, or the debts are all paid, and no purpose for which money is to be left in the hands of a testamentary guardian and executor, the money is ordered into Court, and laid out for the benefit of the parties concerned.

The following decree was entered:

"It is declared, that the defendant *P. M.*, is responsible, as guardian, for the proceeds of the real and personal estate of *J. M.*, deceased, belonging to the plaintiffs, and which may have come to his possession, or under his control, and particularly for which joint receipts of the dates of the 6th and 24th of *May*, 1815, were given by him and the defendant *G. M.*, as guardians, to the plaintiffs. And it is further declared, that the two plaintiffs who are adults, are entitled to payment from the said guardians, and from the defendants *J. R. B.* and *P. M.*, as their sureties, upon their default, of their proportion of the proceeds of the said personal estate. And it is further declared, that the plaintiffs who are infants, are entitled to call the said guardians to account, touching their respective proportions of the proceeds of the said real and personal estate; and, inasmuch as one of the guardians and one of the sureties given by them, have become insolvent, and the security otherwise impaired, the infant plaintiffs are entitled to have the balance of such proceeds due to them, either brought into Court, to be put out under its direction, for their benefit, or to have the defendant *P. M.*, the solvent guardian, give additional and satisfactory real security, to account and pay, when the infants come of age. It is thereupon ordered, &c. that it be referred to a master, to take and state an account of the amount due to the plaintiffs *J.*

J. M. and *J. M. M.*, from the defendants *G. M.* and *P. M.*, as their late guardians, for their proportion of the proceeds of the personal estate, and that on such accounting, the defendant *P. M.* be charged with their proportion of the proceeds which may have come to his hands or possession, and particularly for which he united in a receipt with the defendant *G. M.*, to two of the administrators of the said estate; and that he be also charged with lawful interest on such proportion of the said proceeds, from the date of such receipt, and be credited for all payments made to those plaintiffs by either of the defendants, and that he be also entitled, on such accounting, to all just allowances, charges, and expenses, as guardian, and properly chargeable to those plaintiffs. And it is further ordered, that the master, also, take and state an account of the moneys due the infant plaintiffs, for the proceeds of the real and personal estate belonging to them, and which may have come to the hands or possession of the defendants *G. M.* and *P. M.*, or either of them; and that on such accounting, the defendant *P. M.* be charged with the proportion of the said proceeds, belonging to the said infants, which may have come to his hands or possession, or been subject to his disposition or control, and particularly that he be charged for the amount thereof so due to the said infants, and contained in the said receipts of the 6th and 24th of *May*, 1815, or either of them; and as and for so much cash received, from the dates of the said receipts respectively, together with lawful interest on the balance so to be found due to the said infants, from the date of the said receipts; and that the said *P. M.* be credited for all payments and advances (if any) to and for the said infants respectively, made by either of the defendants, and be allowed all just allowances, charges, and expenses, as such guardian, and which may be properly chargeable by him to the said infants. And it is further ordered, that he take and state an account of the amount, value, and competency, of any security, real or personal, that may be offered by or on behalf of *P. M.*,

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for the payment of the said balance, with interest, when the said infants shall respectively arrive at full age, together with his opinion touching the solidity and safety of such security; and that he report thereon with all convenient speed; and the question of costs and all further questions are reserved until the coming in of the report."

THE NORTH RIVER STEAM BOAT COMPANY
against
A. N. HOFFMAN and others.

Where a corporation are plaintiffs, it must appear, that all the persons jointly interested, are entitled to sue in the Courts of the United States, in order to give a Circuit Court of the U. S. jurisdiction of the cause.

If some of the parties, plaintiffs and defendants, respectively, are citizens of the same State, the cause cannot be removed from the State Court to a Circuit Court of the U. S.

This Court will grant and continue an injunction to enforce the statutes of this State, giving an exclusive right to certain persons to navigate the waters of this State with *steam boats*.

July 2d. BILL filed by the plaintiffs, for an injunction to stop the running of the steam boat, called the *United States*, on the waters of *Hudson* river. The bill stated the several statutes of the Legislature of this State of 1798, 1803, 1807, 1808, 1811, and 1820, by virtue of which the plaintiffs claimed to be entitled to the exclusive right and privilege, for the time therein limited, of employing and using boats propelled by fire or steam, upon the navigable waters of this State. The bill charged, that the plaintiffs, and those from whom they derived title, had been in the uninterrupted use and enjoyment of this exclusive privilege, un-

der the protection of the laws, for the last ten years and upwards, and had laid out, in the purchase of such right, and in steam boats, the sum of $600,000. That the defendants had lately combined to build a steam boat to invade and destroy the right of the plaintiffs, and were actually engaged in that trespass, and navigating the *Hudson* river, and carrying passengers to and from *New-York* and *Albany*.

The bill was sworn to, and, according to the direction of the Chancellor, due previous notice of the motion for an injunction was given to the defendants.

The defendants regularly entered their appearance to the bill, and immediately presented a petition to remove the cause into the Circuit Court of the *United States*, to be holden in *New, York*, in *September* next.

In support of their petition, four of the defendants stated, by affidavit, that they were citizens of *New-Jersey*, and sole owners of the new boat, and were desirous of removing the cause into the Circuit Court of the *United States*, and offered the requisite security. It was further stated, by one of the defendants, upon affidavit, that the boat *United States* had been enrolled, and a coasting licence obtained for her, from the custom house at *Perth Amboy*, in *New-Jersey*, and had regularly cleared out from *Perth Amboy* for *Albany*, and was intended to carry, on freight, foreign merchandize, on her trips between *Albany* and *Perth Amboy*, and also to carry passengers; and that the boat had regularly cleared out, on each trip from *Perth Amboy*, and duly reported herself to the surveyor of the port of *Albany*.

In opposition to the petition for removal of the cause, one of the plaintiffs, or a member of the company, stated by affidavit, that he was secretary, and kept the books of the company, and that all transfers of shares or stock were made upon the books, and that three of the stockholders, whom he

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named, were citizens of *Connecticut*, and another a citizen of *New-Jersey*, and another a citizen of *Pennsylvania*, and that they were all residents in those States; and the fact of their residence in those States, respectively, for several years past, was proved by the affidavit of another person.

The cause was argued by *Colden* and *T. A. Emmet*, for the plaintiffs, and by *Wells*, *D. B. Ogden*, *W. A. Duer*, and *Woodward*, for the defendants.

The counsel for the plaintiffs contended,

1. That the injunction ought to be allowed upon the matter of the bill, and before the defendants were permitted to appear and present their petition.

2. That the case was not within the act of Congress allowing a removal.

3. That the merits of the case were with them, and had been setled by two unanimous decisions of the Court of Errors; and this case could not be distinguished from those cases.

The counsel, in support of these points, cited 3 *Dallas*, 382. 4 *Dallas*, 7. 12. 22. 1 *Cranch*, 343. 2 *Cranch*, 126. 3 *Cranch*, 267. 5 *Cranch*, 57. 1 *Wheaton*, 91. 3 *Wheaton*, 501. 9 *Johns. Rep.* 507. 17 *Johns. Rep.* 488.

The counsel for the defendants contended for the reverse of all the above points, and cited 3 *Wheaton*, 591.

THE CHANCELLOR. The petition to remove the cause to the Circuit Court of the *United States*, cannot be granted, because the Circuit Court have not cognizance of the case. If the petition is granted, the cause will undoubtedly be dismissed from the Circuit Court, when it meets at *New-York*, in *September*; and in the mean time, the defendants will be left to reap undisturbedly the profits of their illegal invasion of the plaintiffs' privilege. It appears, undeniably, by the bill, and by the affi-

davits in aid of it, that some of the members of the association of the plaintiffs are citizens of other S tate, and one of them a citizen of *New-Jersey*. Now, it has been repeatedly decided by the Supreme Court of the *United States*, (*Strawbridge* v. *Curtis*, 3 *Cranch*, 267. *Hope Insurance Company* v. *Boardmen*, 5 *Cranch* 57. *Bank of the U. S.* v. *Deveaux*, 5 *Cranch*, 61. *Corporation of N. Orleans* v. *Winter*, 1 *Wheat.* 91. *Cameron* v. *M'Roberts*, 3 *Wheat.* 591.) that the right of a corporation to sue in the Federal Courts, must depend upon the character and citizenship of its several members; and that in order to give the Federal Courts jurisdiction of a case, it must appear, affirmatively and clearly, that all the plaintiffs in the given case, are entitled to sue or be sued in the Federal Courts. Each person concerned in the joint interest must be competent to sue or be sued in those Courts. To apply the doctrine to this case, it will be perceived, at once, that the plaintiffs cannot sue the defendants in the Federal Courts, because some of the plaintiffs and some of the defendants, who are parties to the suit, *and have not disclaimed*, are, respectively, citizens of this State; and citizens of the same State cannot sue each other in the Federal Courts. So, it appears, also, that one of the plaintiffs is a citizen of *New-Jersey*, and he cannot sue the defendants who are citizens of *New-Jersey*, in the Federal Courts. The parties to the suit must be, as against each other, *wholly* citizens of different States, or the Federal Courts have no jurisdiction. The Federal Courts say so, themselves, and have uniformly disclaimed any jurisdiction, where the case was not plainly, and by positive averments upon record, brought within their cognizance. (3 *Dallas*, 382. 1 *Cranch*, 313. 2 *Cranch*, 1. 126.) There can be no possible doubt in this case, upon the facts admitted, that this cause could not be decided originally in the Federal Courts, and that, therefore, it not be removed in the way proposed; and though I may regret the necessity of exercising the jurisdiction

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which is thrown upon me in this case, yet I have no alternative. The case can eventually be reviewed in the Supreme Court of the *United States*; but it must go there, in the ordinary channel, by means of an appeal from the decision of this Court to the Court of Errors, and from the Court of Errors to that Court.

The motion to remove the cause is consequently denied.

The next question is upon the motion for an injunction founded upon the bill.

On this point, there is still less room for hesitation. The plaintiffs are in possession of exclusive privilege, granted or confirmed by six different Legislatures; and if such a right, flowing from such an authority, be not conclusive and binding upon all our Courts and all our citizens, it would be idle to talk about rights and property, or the security of a government of laws. The validity and constitutionality of these laws were brought into discussion in the Court of Errors, in *March*, 1812, in the cause of *Livingston* v. *Van Ingen*, and the Court unanimously declared these laws to be valid and constitutional.—The defendants have, however, got their boat enrolled and licensed under the laws of the *United States*, as a coasting vessel, and so had the defendant in the cause of *Ogden* v. *Gibbons*, in which the parties were citizens of *New-Jersey*; and yet it was decided by the Court of Errors, with the same unanimity, in *January*, 1820, that the circumstance of the enrolment and license made no alteration in the case, and gave the steam boat no additional right to disturb the plaintiffs in the enjoyment of their exclusive privilege under the several statutes of this State. Whenever the Supreme Court of the *United States* shall decide that the privilege granted under our statutes is against the constitution of the Union, it will be in time to abandon the statutes, and give up the protection of the boats navigating under that sanction. But no such decision has been made, or is anticipated, and the present case cannot but excite surprize for the temerity

and infatuation with which the laws are once more attempted to be infringed. This Court has no alternative left. It is bound to declare and to enforce the law as it stands, and the injunction must be granted according to the prayer of the bill.

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BAY v. TALLMADGE.

BAY and others, *administrators* of BAY, and VAN NESS and others, surviving executors of BACHMAN,

against

J. TALLMADGE.

Where *bail* become fixed at law with the payment of the debt of the defendant, their character of bail ceases. After judgment and execution against bail or sureties, there is an end to the relationship of principal and surety; and the bail cannot claim any advantage against the creditor, on the ground of a want of due diligence in prosecuting the principal debtor.

April 3d, and July 9th.

THE original bill, filed 10th of *June*, 1799, by *John Bay* and *Abraham Bachman*, stated, that on the 24th of *September*, 1795, the defendant, pretending to have title to lands in *Pennsylvania*, under the *Connecticut* claim, sold the same to *Henry Platner*, and took his bond, for the consideration money, being 1100 pounds. That *Bay* and *Bachman* became *bail to the arrest*, in *April*, 1796, for *Henry Platner*, in an action of debt brought by the defendant, *J. T.*, against him, in the Supreme Court, on the bond of *P.* That on the 17th of *October*, 1796, *B.* and *B.* were arrested on the bail bond, and they, afterwards, procured *Peter Van Loon* to become *bail to the action*, and the bail piece, with the justification, was filed. The suit on the bail bond was prosecuted by the attorney of *T.*, and a judgment by default entered, and a *fi. fa.* issued,

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by virtue of which, the sheriff seized the property of *B.* and *B.* Notice of an application to the S. C. for relief, was given by *B.* and *B.*, but the motion was waived, in consequence of an agreement in writing between the attorneys of the parties in the original suit and the attorney for the plaintiffs, by which it was agreed, "that the judgment should be entered up by consent, in the original suit, against *P.* upon condition that the plaintiff in that suit stay proceedings against the defendants in the bail bond suit, until the event of the measures taken to recover of the defendant *P.* so much of the debt, interest, and costs, as might be recoverable, should be ascertained." That a judgment by default was accordingly entered against *P.* in the original cause, without any new or other bail to the action, and a *fi. fa.* was issued in *April* vacation, 1797, and a levy made by the sheriff on the personal property and real estate of *P.*, consisting of a farm, worth above 1500 pounds, and goods and chattels, to a considerable amount. That *Bachman*, (now deceased,) had a prior judgment against *P.*, which he consented to waive in favour of *T.* the present defendant. That the sheriff advertised the property for sale on a day in *July*, 1797, and on the day appointed for the sale, it was postponed to the 14th of *October* following, without the privity or consent of the plaintiff in the suit, or his agent, but with the consent of *Bay*, one of the bail to the arrest. That on the 14th of *October*, 1797, *T.* did not attend; and the sheriff, by direction of *Solomon Sutherland*, *T.'s* agent, postponed the sale for six months. That *Bachman*, and the attorney or agent of *Bay*, were present and urged the sale at the time, and the agent of *Bay* declared, that if the sale did not proceed, *Bay* would not consider that they were bound to secure the debt. That, at that time, the personal property, consisting of hay, grain, stock, cattle, &c., levied on, was worth 700 pounds. That *J. R. Van Rensselaer* was present, and offered to bid to the amount of the debt, interest,

and costs, on a credit of six months, and give satisfactory security for the payment; but *S. Sutherland*, agent of *T.*, refused the offer. That on the 14th of *April*, 1798, the day to which the sale was last postponed, the real estate of *P.* was sold, and bid off by the son and agent of *T.* for 400 dollars; and the personal property on the farm, being a very small part of what was there in *October* preceding, was sold for 400 dollars. That *Bay* attended for the purpose of procuring such a sale of the property as would extinguish the debt, and bid accordingly. That *M. B. T.* the son and agent of *T.*, requested him not to bid, and promised that if he, *Bay*, would desist, and permit him, the son of *T.*, to become the purchaser, *Bay* should be equally interested in the purchase; and *Bay* accordingly desisted. That at the time the sale was postponed, in *October*, 1797, there subsisted a controversy respecting the contents and import of the deed from *T.* to *P.*, and the extent of the covenants it contained: and it was then agreed between *S. S.* as agent of *T.*, and *P.*, that the latter should deliver up the deed, and release the covenant of warranty, in six months, from the 14th of *October*, 1797, and in lieu thereof, accept a deed, for the two townships of land, with a covenant of warranty against the *Connecticut* claim only; and for the performance of this agreement, *S.* and *Charles Vincent* assigned and delivered to *J. R. V. R.* a bond from *H. J. V. R.* to them, on which was due the sum of 400 pounds, for the use of *T.*, if the deed should not be delivered up and the covenant released; and in consideration thereof, *S. Sutherland*, as agent of *T.*, agreed to postpone the sale for *six months*. That the agreement was reduced to writing, and signed by *S. S.* as agent of *T.*, and by *P.* That on the 10th of *April*, 1798, pursuant to the agreement, *P.* delivered up the first deed, with a release of the covenant, and *T.* executed to him a second deed. This deed (which was set forth in *hæc verba*) recited the agreement of the 12th of *October*, 1797, and that the deed was made in pursuance

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thereof. The bill further stated, that the son of *T.* sold the land of *P.* purchased by him at the sheriff's sale, without covenants, to *A. Spencer* and *J. C. Hogeboom*, for less than the value, but for more than the amount due to *T.* from *P.* That *T.*, the defendant, received from *A. S.* and *J. C. H.*, a written indemnity against *B.* and *B.*, by which *T.* was to obtain from them the amount of the judgment against *P.*, deducting the bid at the sheriff's sale, and *A. S.* and *J. C. H.* were to keep the defendant, *T.* harmless from any claim of *B.* and *B.* That the defendant had ruled the sheriff to return the execution against *B.* and *B.* before the 12th of *June*, 1799, &c. The bill prayed that the defendant might be enjoined from all further proceedings at law, and for general relief.

Bachman, one of the plaintiffs in the original bill, having died, a *bill of revivor* by *Bay*, and the executors of *Bachman*, was filed *July* 3d, 1802: and *Bay*, *afterwards* dying, another bill of revivor was filed by his administrators, and the surviving executors of *Bachman*, on the 20th of *March*, 1819.

The *answer* to the original bill was filed *July* 5th, 1799; but by some arrangement between the counsel of the parties, the original bill and the answer were re-engrossed, and filed as of the 22d of *October*, 1803, in the names of different solicitors. The answer admitted the sale of the *Pennsylvania* lands by the defendant to *P.* &c., the *bond* for the consideration money, and the suit thereon in the S. Court, and alleged that the defendant had a good title to the lands under the *Connecticut Susquehannah Company*. That no notice of special bail was received by the defendant's attorney, until after the service of the writ in the bail bond suit, and there was no offer to pay the costs, and the person offered as special bail was insolvent. That both *B.* and *B.* were arrested in the suit

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on the bail bond, and a judgment entered there in, by default, in *January* term, 1797, and execution was issued thereon and levied on the property of both of them. That *Bay* gave notice of a motion to set aside the judgment; but as the proceedings were all regular, and *T.* had lost a trial, the motion could not have been granted. The defendant admitted the agreement of *October*, 1797, as stated in the bill, to which a stipulation was annexed that the plaintiffs should not require an execution to be issued on the suit against *P.* in any other county than *Columbia*. That a *fi. fa.* was issued on the 5th of *June*, 1797, against *P.* to the sheriff of *Columbia*, who levied on a farm of 150 acres and a half, a grist and saw mill, belonging to *P.* which was worth, at least, 1500 pounds, and on personal property, the amount of which the defendant did not know. The defendant admitted the statement as to the postponement of the sale in *October*, 1797, and that his attorney, *A. Spencer*, attended, and *S. Sutherland* attended also, being interested in the avails of the judgment, and the defendant being himself obliged to go a journey. That the son of the defendant purchased the farm at the sheriff's sale, on the 11th of *April*, 1798, for 378 dollars, and the personal property for 74 dollars and 34 cents; but denied that the agent of *Bay* made the declaration stated, or that *J. R. V. R.* made the offer stated. That *C. Vincent* appeared and claimed the land, and the greater part of the personal property, under a deed from *P.* prior to the judgment. The defendant admitted an agreement of the import and effect as charged in the bill, at the time of the last postponement of the sale made by *J. S.*, in his behalf, though without the knowledge or direction of the defendant: he admitted the assignment of the bond to *H. S. V. R.* on the condition stated, but denied that the transaction was the consideration for postponing the sale; but that *S. S.* agreed to the postponement, in consequence of the entreaties of

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P. and his wife, and under assurances that *P.* would, in the mean time, procure the money to satisfy the judgment; and *T.* acquiesced in the postponement for the same reason, and from a belief that the money would be procured. The defendant admitted the surrender of the old deed, and the giving of a new deed, as stated in the bill; and that the sheriff had been served with a rule to return the execution against the plaintiffs. That after the sale of *P.*'s estate, he directed his attorney to proceed against the bail, *B.* and *B.* That they did not pretend that they were not liable, but urged the defendant to proceed against the estate of *P.* in other counties; and the defendant's attorney accordingly issued executions to other counties; and it being ascertained that no property of *P.* could be found, the defendant again directed his attorney to proceed against *B.* and *B.*, who had since, repeatedly, applied to the defendant for indulgence, and did not pretend that they were liable. The defendant averred, that *Bay* was secured, and would not be damnified by paying the balance due to the defendant. That no injury had arisen to the plaintiffs from the postponement of the sale from *October*, 1797, to *April*, 1798, as the property of *P.* sold for more, by that arrangement. That *Bay* had received money under securities given to *B.* and *B.* by *P.* for their indemnity as bail. The defendant denied any conveyance of the farm of *P.* by him or *M. B. T.* to *S.* and *H.*; but he admitted that *M. B. T.* with the consent of the defendant, in *January*, 1799, sold the farm to *J. C. H.* for 1500 dollars.

Many witnesses were examined by both parties; and the material parts of the evidence are stated in the opinion delivered by the Court.

The cause was brought to a hearing, *April* 2d, 1821.

Henry, for the plaintiffs. He stated the following points:

1. That the defendant having given time to *Platner*, on the

execution against him, without the assent of *B.* and *B.*, his bail, they were discharged. (2 *Caines' Cases in Error*, 1. 40. 42. 49, 50. 58. 7 *Johns. Rep.* 332. 10 *Johns. Rep.* 180. 587. 595. 13 *Johns. Rep.* 383. 17 *Johns. Rep.* 384. 2 *Johns. Ch. Rep.* 554. 559. *Holt's N. P. Rep.* 84. 3 *Wheat. Rep.* 148. note *a.*)

2. That the bail were more strongly entitled to be discharged, as the time was given to the principal, contrary to their express prohibition, and to their injury.

3. That the defendant ought to restore to the plaintiffs what he had exacted from the bail, with interest.

4. That the defendant should be decreed to pay the costs.

Van Vechten and *Tallmadge*, contra, contended, 1. That *B.* and *B.*, having become fixed at law, as bail, ceased to stand in the relation of sureties. (1 *Tidd's Pr.* 158. 1 *Sellon*, 192.)

2. That the defendant having elected to proceed on the bail bond, waived his right to proceed against the principal, and *B.* and *B.* became the debtors. (6 *Johns. Rep.* 97.) The bail stand in the place of their principal, and can be relieved on no other terms than the payment of the debt, interest, and costs. (2 *Vern.* 608, 609. *Ambl.* 446. 11 *Vesey*, 22.)

3. That *B.* and *B.* being fixed as bail for the debt, could no longer be regarded as sureties; and after consenting to the adjournment of the sale, in *July*, 1797, could not come into this Court to compel the defendant to proceed against the original debtor.

4. The defendant has done no act whatever, that could absolve *B.* and *B.* from their liability. And they had, by repeated acts, since 1797, acknowledged their liability. The doctrine to be found in some late decisions, as to sureties, was not applicable. (3 *Wheat.* 524. 3 *Binney*,

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520. 15 *Johns. Rep.* 433. 16 *Johns. Rep.* 154. 17 *Johns. Rep.* 404.

July 9th. The cause stood over for consideration until this day.

THE CHANCELLOR. *Bay* and *Bachman*, whom the present plaintiffs represent, were bail to the arrest in a suit at law, commenced by the present defendant against *Henry Platner*. Special bail not being put in, the bail bond was assigned, and the bail to the arrest were sued and prosecuted regularly to judgment and execution. A *fi. fa.* for the amount of the debt, interest, and costs due from *P.*, the original defendant, was issued and levied upon their property. An agreement, in writing, was then entered into, bearing date the 28th of *April*, 1797, between the present defendant, by his attorney to the suit, and the agent or attorney of *B.* and *B.* the bail, by which judgment was to be entered by consent against *P.*, the original defendant, and proceedings stayed against *B.* and *B.* in the bail bond suit, until the effect of measures taken to recover of *P.* so much of the debt, interest, and costs as might be recoverable by execution, within the county of *Columbia*, should be ascertained.

Under that agreement, a *fi. fa.* was, on the 5th of *June*, 1797, issued and levied upon personal property, and a farm belonging to *P.* The property was advertised for sale by the sheriff, in *July*, 1797, and on the day appointed for the sale it was postponed to the 14th of *October*, 1797, against the consent of the agent of the present defendant, but with the consent of the agent of *Bay*, one of the bail to the arrest. On the 14th of *October*, the present defendant did not attend, but *S. Sutherland*, who was interested in the judgment, attended at the place of sale on his behalf, and as his agent, agreed to a further postponement of the sale, to the 14th of *April*, 1798. The defendant says, in his answer, that *S. S.* was not authorized to attend as his agent, or agree to any postponement of the sale, but he, the defendant, afterwards,

acquiesced in the postponement, for the reasons that induced *S. S.* to assent to it, and which were the intreaties of *P.* and his wife, and the assurances of *P.* that he could, in the interval, procure money to pay the debt.

The whole of the present controversy arises upon this postponement of the sale.

The counsel for the plaintiffs contend, that by giving further time to *Platner* on the execution, without the assent of *B.* and *B.*, they were discharged; and especially as such postponement was against their express prohibition, and to their injury. On the other side, it is contended, that *B.* and *B.* having their property charged in execution, had become principal debtors, and had lost, as respected the present defendant, the character and privileges of bail, and that the defendant did not discharge them by the postponement of the sale; and that *B.* and *B.* afterwards repeatedly waived any such pretence, and recognized their existing responsibility.

The fact of the postponement is admitted, but the objection to it, on the part of the bail, is denied.

One of the witnesses for the plaintiffs (*J. R. Van Rensselaer*) says, that *Bachman*, one of the bail, and the agent of the other, were present, and that such agent objected to the postponement, and informed either *S. S.*, or the attorney of the defendant, that his principal, *Bay*, would not hold himself further bound for payment of the judgment, if the sale was postponed. Another witness for the plaintiffs (*David Ingersol*) deposes much to the same effect, and that the agent of *Bay* objected to the postponement of the sale, and observed, that if they did not proceed, the two bail would consider themselves discharged, and that either *S. S.* or the attorney of the defendant, replied, that there was property enough, and that they would not look to the bail.

It is to be observed, that *S. Sutherland* is dead, but the answer denies any knowledge or belief of any such objection made on the part of the bail, to a postponement of the sale.

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and the attorney of the defendant (*A. Spencer*, now Ch. J.) who was present at the postponement, and was the person most likely to be consulted, as to every measure respecting the execution, and very likely to take accurate notice of every transaction, never heard any such objection, or understood that any such objection was made. He says, the sale was postponed at the earnest request of *Platner* and his wife, to enable him to raise the money. It is also improbable, that *S. Sutherland* should have undertaken, without any consultation with the attorney of the defendant, to reply in the manner he is said to have done, that the defendant would not look to *B.* and *B.* *Ingersol*, also, says, that the sheriff declared, that if the sale was postponed, it must be at the risk of the defendant, and that either *S. S.* or the attorney of the defendant replied, that they would take the responsibility on themselves. The attorney says, he never heard of any such observation from the sheriff, and never understood that either the sheriff or any of his deputies were opposed to the adjournment. Such a reply from either the attorney or *S. S.* would be very improbable.

The communications on the part of *B.* and *B.*, and on the part of the sheriff, would naturally have been made to the attorney to the execution, rather than to *S. S.*, a stranger, who came there from necessity, because the defendant himself was absent on a journey, and who had no instructions from the defendant. I think it, therefore, very possible, there may have been some loose conversation, misunderstood by the witnesses, and that any serious and direct objection to the postponement would have been addressed to the attorney himself. The two witnesses who mention the fact of the objection, do not either of them recollect, with any certainty, so material a point as the identity of the person to whom the objection was made. They do not know whether it was made to *Sutherland*, the assumed agent, or to the attorney for the defendant. This fact considerably im-

pairs the force and precision of their testimony; and though I have no doubt they both speak to the best of their memory, yet considering the circumstances attending the case, and the very remote period of time to which their testimony refers, I cannot say that I think the fact of a direct or explicit dissent from the postponement of the sale, is made out to my entire satisfaction.

2. But assuming the fact of a dissent from the postponement, as charged on the part of the plaintiffs, the postponement did not discharge *B.* and *B.* from their obligation to pay the judgment against them. Their privileges as bail were lost, and they had become fixed as principal debtors; and what they were entitled to require of the defendant, rested upon their contract with him of the 26th of *April*, 1797, not upon their character as bail. They were entitled to require the fulfilment of it, upon the footing of a contract with good faith; and that necessarily implied reasonable diligence in the efforts to collect the money of *Platner*. It required nothing more; and I am not aware of any case that has ever imposed upon the creditor the necessity of peculiar diligence against the principal, on the ground of the still subsisting relation of principal and surety, *after judgment and execution* against the bail or the surety. It becomes, then, too late to inquire into the antecedent relations between the parties. Those relations became merged in the judgment. This was expressly declared to be the case as between the holder and maker, and endorser of a promissory note, by the Supreme Court of the *United States*, in *Lenox* v. *Prout*; (3 *Wheat.* 520;) and I cannot perceive that the plaintiffs *B.* and *B.* have any greater privileges after judgment against them, in consequence of their original character as bail, than the party had in the case cited, who was originally an endorser without consideration. In that case, there was judgment against *P.* as endorser, and another judgment against *D.* as maker of a promissory note; and *P.* called on the

After judgment against bail, their character of bail is at an end; and they can no longer claim the privileges of sureties.

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creditor, and requested him to issue execution against the maker. He did so; but recalled the execution before any thing was done, though *P.* had offered to point out to the sheriff, property of *D.*, and to indemnify him for taking and selling it. It was shown to be probable, that if the *fi. fa.* had been prosecuted to effect, a great part of the judgment might have been recovered of *D.*, the maker. The Circuit Court had, upon these circumstances, perpetually injoined the holder from proceeding at law on the judgment against *P.*, but that decree was reversed by the unanimous opinion of the Supreme Court, on the ground, that by the judgment, the endorser, as well as the maker had become a principal debtor, and he ought to have paid the money at once, and taken under his own direction the judgment against the maker, by having it assigned to him.

The meaning of the agreement of the 28th of *April*, 1797, was, that the defendant was to take measures to recover the debt of *P.* under the evidence of a reasonable discretion. He was not bound to press an immediate sale of his property with unusual severity. He did proceed with due diligence; and the first adjournment of three months was against his consent, and at the instance of *B.* and *B.* The second adjournment was called for by the intreaties of the debtor, and under assurances and expectations that the money could be procured in the intermediate time. If the plaintiffs *B.* and *B.* were dissatisfied with the second adjournment, they should have come forward and offered payment, and called for an assignment of the judgment, for their indemnity. This they would have been entitled to demand, and if it had then been refused, the refusal might have laid the foundation of a claim for the assistance of a Court of Equity. But when it appears that the creditor acted in good faith and from humane motives towards the debtor, and with a view to facilitate the payment of the debt, it would not be consonant to the principles of this Court, to

lend the exertion of its powers to punish a party with the loss of his debt, for a reasonable forbearance to the debtor. It would be giving too severe and rigorous a construction to the agreement of *April*, 1797.

I have not considered as of any importance, in this case, the circumstance charged in the bill, that the postponement was in consideration, and as part of an agreement on the part of *Platner*, to deliver up his deed from the defendant, and to accept of a new one with less extensive covenants. The allegation did not appear to be sufficiently supported, and the counsel who argued the cause, on the part of the plaintiffs, did not rely upon it, as I apprehended, for he put the cause, by his points, not upon the ground of any new agreement with *P.*, but simply on the ground that the defendant had "given time" on the execution, without the assent, and even against the prohibition of *B.* and *B.*

The bill charged that the agreement alluded to was reduced to writing, and signed by *S. S.* as agent of the defendant and by *Platner*; and in another part of the bill the new deed is set forth *verbatim*; it contains a recital of the agreement, but the postponement of the sale forms no part of it, and the charge, therefore, is refuted in the bill itself.

The answer expressly denies that the postponement was in consideration of that agreement, and avers it to have been made by reason of the entreaties of *P.* and his wife, and under assurances that he could, in the mean time, raise the money to pay off the debt.

So stands the fact upon the pleadings, and the parol proof is equally contradictory.

J. R. V. R. says that the postponement was in consideration, and as part and parcel of the agreement to surrender the original deed, and to receive a new one; and he says that the agreement was made between *A. S.* and *S. S.* (the attorney, and the agent of defendant,) and himself, as the

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agent of *Platner*. But the attorney for the defendant (*A. S.*) says that the postponement was for the very reasons stated in the answer, and he neither knows nor believes that getting up the original deed was the consideration of the postponement, and that he neither assented to, nor dissented from, the adjournment.

It is very certain, then, that that charge in the bill is not sufficiently supported, and must be abandoned.

3. The subsequent acts of *B.* and *B.* were a complete waiver of any claim in equity founded on the postponement of the sale, and a full and absolute recognition of their responsibility.

The sale was in *April*, 1798, and it is proved, that on the 4th *July*, 1798, both the plaintiffs, *B.* and *B.* applied to the attorney of the defendant, to have an execution issued against the property of *P.* in *New-York* and *Onondaga*. They declared that they desired it, for the purpose of exonerating themselves, as far as possible; and the attorney, at their instance, issued executions accordingly, though it was an act entirely gratuitous, and not within the agreement. So, again, at the instance and request of the same persons, on the 5th of *October*, 1798, he issued another *fi. fa.* to the sheriff of *Columbia*, for the purpose of levying on two negroes and some timber, on the allegation made by them, that the same was the property of *P.* The personal property was sold, and some of it purchased by one of the plaintiffs, *Bay*. All these recognitions were before the filing of the bill; and the attorney to the defendant says, that *B.* and *B.* did not; on those occasions, or any other, pretend, that they were not liable for the unsatisfied balance due on the debt of *P.* The attorney for the defendant states further, that since the sale of the negroes and timber, he has been frequently applied to by *B.* and *B.* to delay the collection of the balance of the debt, without making any suggestion, that they were not liable; and he states further, that on the 9th of *January*, 1800, he received a bond from the plaintiff *Bay*, and others, for the balance re-

maining unpaid and due to the defendant; that the bond was taken as a full settlement of the judgment against *B.* and *B.*, and it was afterwards paid.

After such repeated acts of acknowlegement of responsibility, the original plaintiffs *B.* and *B.* either never intended to hold themselves discharged from the payment of the judgment against them in consequence of the postponement of the sale, or they afterwards retracted that determination. If any right accrued to them, in equity, by reason of the postponement, to be relieved, they have voluntarily waived that right by their subsequent admissions of their obligation to pay. They have required the defendant to issue executions into other counties for their benefit, and it has been done. They have called for another execution into the county of *Columbia*, and it has been issued, and property sold under it; and, finally, they have paid the judgment, and discharged it. They have no more equity to have that payment refunded, than a person who had voluntarily paid a debt barred by the statute of limitations. The equity of the suit has failed, and the several bills that have been filed in the cause must all be dismissed. But considering the great length of time in which the parties have mutually slept upon their claims, (for it is twenty-two years since the first answer of the defendant was put in,) and considering the representative character in which the plaintiffs have assumed the prosecution of the cause, and the contradiction and uncertainty, attending some of the material matters of fact in litigation, I shall dismiss the bill without costs.

Decree accordingly.

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BRINKERHOFF and others *against* MARVIN and others.

A Court of law has an equitable jurisdiction over judgments by confession, entered upon warrant of attorney: and it may examine and decide as to the sufficiency of the *specifications* required by the statute, (*sess.* 41. *ch.* 259. *sec.* 8.) to be filed with a judgment entered by confession on warrant of attorney. Where different judgment creditors, by confession, appeared before the Supreme Court, and discussed their respective rights as to the priority of *lien* of their respective judgments, without making any objection to the jurisdiction of the Court, or to its competency to examine and decide, as to the validity of the *specification*, accompanying the judgment of the plaintiffs, this Court will consider the decision of the Supreme Court on the case as conclusive.

A judgment or other security may be taken and held for future advances or responsibilities; but it *seems* that advances made or responsibilities incurred, *after* a subsequent judgment, will not be covered by such judgment.

Where a creditor has separate judgments against each of two partners, the partnership property will be bound to the same extent as if the amount of both judgments had been included in a joint judgment for the whole against both partners.

Where there are two judgment creditors, one of whom holds personal property as collateral security, the Court will not confine the latter to the personal security, or restrain him from prosecuting his remedy under the judgment, until such personal property is exhausted, or the rights concerning it are first settled, if he offers to substitute the other judgment creditor in his place, on being paid the amount of his debt.

July 10*th*. THE bill, filed 28th of *March*, 1821, stated, that in *July* 1819, *J.* and *Z. Taylor*, of *Saratoga*, being largely indebted to the plaintiffs, for goods sold to them, executed a bond to the plaintiffs, for the amount due, with a warrant of attorney to confess judgment thereon. That judgment was entered up in the Supreme Court, on the bond, the 27th of *November*, 1819. That on the 3d of *January*, 1820, the

defendants, *W. J.* and *A. Marvin*, entered up a judgment against *J. Taylor*, by confession, on filing special bail, without a writ or declaration, on a *cognovit actionem*, for 5,755 dollars and 60 cents, as collateral security for endorsements then made, or thereafter to be made, for *J.* and *Z. T.*, and for moneys then due, or thereafter to be due. That the defendants had, at that time, endorsed a note, given by *J.* and *Z. T.*, for goods previously purchased. That on the 7th of *April*, 1820, the defendants entered up another judgment against *Z. T.* for the like sum of 5,755 dollars and 60 cents, on filing special bail and a *cognovit actionem*, in like manner, which was given as security for the purposes above mentioned, for partnership debts of *J.* and *Z. T.* That the defendants issued executions on those judgments, in the counties of *New-York*, *Washington*, and *Saratoga*, in which personal property of *J.* and *Z. T.* was taken and sold. The bill charged that the defendants colluded with *J.* and *Z. T.* to defeat the just claims of the plaintiffs; that the purchase of goods was colourable, or for an inadequate amount, and that *J.* and *Z. T.* were never indebted to the defendants to the full sum directed to be levied on the executions so issued; and that the defendants held personal securities of *J.* and *Z. T.* to a large amount. That the plaintiffs filed *a specification* of their debt, on entering up their judgment; and have caused a *fi. fa.* to be issued. That the defendants have caused the real estate of *J.* and *Z. T.* to be advertised for sale, under their judgments and executions. That the defendants insist on the priority of the liens of their judgments, under an order of the Supreme Court, directing their judgments to be first satisfied, on the ground that the *specification* filed by the plaintiff was defective. The plaintiffs insisted that the *specification* filed by them was sufficient, and according to the statute; and that the judgments in favour of the defendants were entered up with intent to evade the statute requiring specifications of the debt to

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be filed on entering up judgments by confession, and to cover contingent claims, for a greater amount than was due. The bill *prayed* for a discovery, and for an injunction, &c.

The defendants, in their *answer*, denied every allegation of fraud or collusion, and insisted on the legality and regularity of their proceedings, and on their right of priority of lien under the decision of the Supreme Court. That their judgments were not entered in fraud of the statute, or with intention to evade it; and they admitted the material facts stated in the bills. The defendants set forth the origin and amount of debt due to them from *J.* and *Z. T.* as partners, amounting, in *August*, 1820, to 7,074 dollars and 27 cents, which was intended to be covered by the judgments. They admitted, on the 28th of *August*, 1820, *J.* and *Z. T.* delivered to them, a bond and mortgage of *P. Pearsall*, for 1,137 dollars and 73 cents, as further collateral security. They insisted that the specification filed by the plaintiffs was defective, and not according to the provisions of the statute; that the decision of the Supreme Court giving a preference to the judgments of the defendants, was legal, valid, and just; and that the judgment of the plaintiffs was fraudulent, as it regarded the defendants. That the plaintiffs, on the 19th of *October*, 1820, applied to the Supreme Court, and obtained leave to file a supplementary specification to supply the defects of the former one. That the leave was granted, with a "*saving* to any *bona fide* judgment creditors of *J.* and *Z. T.*, or to any *bona fide* purchaser for a valuable consideration of any land, bound or affected by the judgment in that case, all their legal rights." That the plaintiffs proceeding to sell the real estate of *J.* and *Z. T.* under their judgment as having a priority of lien, the defendants, in *January*, 1821, applied to the Supreme Court, to have the priority of the lien of their judgment established. That the plaintiffs appeared to oppose the application, the merits of which were fully

discussed, without any objection being made, either to the jurisdiction of the Court, or to the form of the application. That the Supreme Court, on the 20th of *January*, 1821, made the following *order*: "That the two judgments of the defendants be preferred to the judgment of the plaintiff, and that the executions on the judgments of the defendants be first satisfied." The defendants claimed the benefit of this order as legal and conclusive; the Supreme Court having jurisdiction to make any order, in a summary way, concerning any judgments by confession, and executions thereon. That the defendants, on the 27th of *January*, 1821, offered to assign their judgments to the plaintiffs, and to put them completely in their places, on being paid the principal, interest, and costs, due to them, which offer was refused; but which they now repeated.

Henry, for the defendants, moved to dissolve the injunction. He cited 3 *Johns. Ch. Rep.* 276. 280. 1 *Caines' Rep.* 498. 9 *Johns. Rep.* 80. 16 *Johns. Rep.* 149. 165. 2 *Johns. Ch. Rep.* 304. 308, 309. *Statute, sess.* 41. *ch.* 269. *sec.* 8. 4 *Johns. Ch. Rep.* 245. 247. He contended, that the defendants had equal equity; and had, also, the legal right and priority, and ought to be left in the enjoyment of it. That the construction given to the statute, relative to specifications, by the Supreme Court, was valid, just, and conclusive.

T. I. Oakley, contra, insisted, that the specification accompanying the original entry of the judgment by the plaintiffs was sufficient; and that the defendants were not *bona fide* judgment creditors, but were endeavouring to enforce, by their judgments, the payment of more than was due to them. That a judgment could not be entered for future contingent demands. That the defendants held personal property pledged to them, which ought first to be appropriated towards satisfying their claims. That the plaintiffs are

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not concluded by the order of the Supreme Court; and that this Court ought to exercise its jurisdiction over the case, in the same manner as if the Supreme Court had made no order. He cited 2 *Johns. Ch. Rep.* 204, 205. 423 549. 4 *Johns. Ch. Rep.* 497. 4 *Vesey*, 396. 1 *Johns. Ch. Rep.* 91. 6 *Johns. Rep.* 284. 10 *Johns. Rep.* 595. 14 *Johns. Rep.* 63. 16 *Johns. Rep.* 106. 17 *Johns. Rep.* 388, 389.

Courts of law have an equitable jurisdiction over judgments entered upon warrants of attorney.

The Chancellor. 1. The decision of the Supreme Court, stated in the pleadings, in which they have declared and adjudged that the specification filed by the plaintiffs, on entering their judgment by confession, was defective, and that, therefore, the judgments of the defendants were entitled to priority, I do not feel myself at liberty to question and overrule. It is settled, as an established rule, that Courts of law have an equitable jurisdiction over judgments by confession, entered upon warrants of attorney. It was so declared by the Supreme Court, in *Frasier* v. *Frasier*; (9 *Johns. Rep.* 80.) and it is necessary to justice, that Courts of law should possess, and liberally exercise that jurisdiction. With respect to the sufficiency of these specifications, required by the act of the 21st of *April*, 1818, (*sess.* 41. *ch.* 259. *sec.* 8.) it is very clear, that the Court of law in which the judgment is entered, must examine and pass upon their validity, whenever the question arises before them. It is necessarily incidental to their general jurisdiction over the proceedings, judgments, and process of their own Courts. If the point arises between two judgment creditors, each claiming a priority of lien, the Court awarding execution must decide, and direct the application of the money to be collected. In this case, the parties appear to have discussed their respective rights in the Supreme Court, and never raised a doubt as to the competency of the Court to examine and decide on the validity of the specification accompanying the judgment of the plaintiffs.

I do not understand that the counsel, upon the motion be-

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fore me, mean to deny the authority of the Supreme Court, as exercised in the case; but they insist, that the decision is erroneous, and that this Court may review the question, and decide the same point between the same parties, without reference to the decision at law.

Where the Supreme Court have decided on the construction of a statute in its application to a case regularly brought before them, this Court will not undertake to review the decision, but consider it conclusive on the case.

In a variety of cases, which constantly arise in the Supreme Court upon special motion, matters of fact may be discussed, and equitable rights may be affected, which are not concluded, but may be reconsidered in this Court, under the advantage of a more full and elaborate investigation and discovery. But when the Supreme Court have been called upon to give a judicial construction to a statute, in its application to a case regularly before them, and they have solemnly settled that construction, as was done in the case of *Lawless* v. *Hackett*, (16 *Johns. Rep.* 149.) upon this very subject of specification of the debt, and when another case (as between the present parties) comes before them upon the same point, and, after discussion, the same rule of interpretation is applied to it, I think it would be very disorderly, and contrary to the respect and comity which is justly due from one co-ordinate tribunal to another, to undertake to correct that decision, upon a bill brought purposely to have that decision reviewed. I cannot perceive the propriety of such a direct interference and control, and I am not willing to assume it. I am not called upon, in a new case, to give a construction to the statute, but I am required to *relieve* the plaintiffs from the order of the Supreme Court, and that, too, upon the avowed ground, that the Supreme Court had given an erroneous construction to the statute in this very case, and between these very parties. This bill seems to have been principally intended to be a bill of review of that decision, and in that view I shall not sustain it.

Nor do I, by any means, wish to be understood as intimating an opinion unfavourable to the accuracy of the construction given by the Supreme Court to the statute. The inclination of my mind is in favour of that construction.

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A bill stating generally, that the demand was for *sundries*, or a *sealed note for the balance*, or for *goods sold, &c.*, according to the specification filed by the plaintiffs in this cause, when their judgment was entered; or a bill for *goods, wares, and merchandizes sold and delivered, and for money lent and advanced, at various times*, as was the case in *Lawless* v. *Hackett*, is too general and loose to meet the mischief which the statute intended to prevent. The statute required not merely a statement of the nature and consideration of the debt or demand, but a *specification*. It was to be a *statement and specification*, and to specify, or to mark by "distinguishing particularities." To leave no doubt of the intention of the law; it is to be a *particular* statement and specification. All this accumulation of words shows that something more was intended than the common counts in a declaration, for *goods sold*, and *work done*, and *money lent*. You must specify what goods, or work, and when and where, if you mean to be *particular*, and to give the opposite party *particular* and *specific* information. So very comprehensive a charge would be *vox et præterea nihil*, and leave the parties full opportunity to contrive and mask their frauds.

A judgment, as well as a mortgage, may be taken to secure future responsibilities.

But, it *seems* that responsibilities incurred *after* a subsequent judgment will not be covered by the judgment.

2. As to the character of the transactions with which the defendants are charged, it is to be observed that every allegation of fraud in the bill is met and denied in the answer, and the defendants have set forth, fully and clearly, the extent and amount of their demand. The two *Taylors*, as partners, are indebted to them to the amount claimed; the two judgments appear to be valid and fair judgments, and each of them will come, as against each partner, and charge his share of the partnership property to the amount of the partnership debt. A judgment or other security may be taken and held for future responsibilities to the extent of it. In *Gordon* v. *Graham*, (cited in 7 *Viner*, 52. *E. pl.* 3. and in 1 *Powell on Mort.* 554.) it was held by Lord Ch. *Cowper*, that if a clause be contained in a mortgage making

it a security for future loans, subsequent loans will be taken as part of the original transaction, and paid before a second mortgage intervening with notice of the clause. So, it was held, in *Shirras* v. *Caig*, (7 *Cranch*, 34.) that a mortgage should stand to secure the real equitable claims of the mortgagee, whether they existed at the date of the mortgage, or arose afterwards, and before notice of the defendant's equity. Again; in *Livingston* v. *M'Inlay*, (16 *Johns. Rep.* 165.) the Supreme Court observed, that if it was part of the original agreement, a judgment may be entered as a security for future advances, beyond the amount then actually due, in like manner as a mortgage may be held as a security for future advances. The limitation to this doctrine I should think would be, that when a subsequent judgment or mortgage intervened, further advances *after that period* could not be covered.

In the present case, the judgments were taken against each partner, in succession, for partnership debts then subsisting and due, or to grow due upon contingent responsibilities. The purpose of the judgments was expressly declared by concurrent receipts, and there is no colour of ground to question their validity. The advances were all made at the date of the second judgment. The defendants have a right to collect, under the first judgment against *John Taylor*, the whole of their demand against the partnership, to the extent of the judgment, out of his share of the joint property; and they have a right, in like manner, to collect under the second judgment against *Z. Taylor*, to the same extent, so that the partnership property is bound to the same extent as if the two judgments had been consolidated, and there was a joint judgment for the united sum against both the partners.

Where a creditor has separate judgments against each of two partners, the partnership property is bound to the same extent, as as if there had been one judgment for the whole against both partners.

The only remaining objection to the motion is, that the defendants held personal property as collateral security, and ought first to resort to and exhaust that fund.

The answer is, that the bond and mortgage were de-

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livered, and not regularly assigned, and, as the *Taylors* allege, for a different and specific purpose; and the defendants, in their answer, offer to give the plaintiffs entire substitution, which would apply as well to that bond and mortgage as to the judgment. This is all that the plaintiffs can reasonably ask for; and it would not be equitable to detain the defendants from their remedy under the judgment, until they had engaged in, and concluded a litigation as to a personal security of such doubtful right and uncertain result.

A judgment creditor who holds, also, personal property as collateral security, will not be restrained at the instance of a subsequent judgment creditor, from prosecuting his remedy under his judgment, until he has pursued and exhausted the personal security, especially when he offers to substitute the subsequent creditor in his place, on being paid the amount of this debt.

The defendants have, therefore, shown themselves to be creditors of *J.* and *Z. T.* with equal equity to the plaintiffs; and they have a legal preference, by the decision of the Supreme Court, of which they ought not, and cannot, upon safe and sound principles, be devested by this Court.

I shall, accordingly, grant the motion to dissolve the injunction, unless the plaintiff shall, in twenty days, elect to pay to the defendants the debt and costs claimed by them, and shown by their answer to be due, and the costs of this suit; and in that case, the amount is to be ascertained, and the costs taxed by a master, and the judgments and the bond and mortgage to be assigned.

Order accordingly.

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SEAVING v. BRINKERHOFF.

SEAVING and MEAD *against* BRINKERHOFF and others.

The "act to prevent abuses in the practice of the law," &c. passed *April* 21st, 1818, (sess. 41. ch. 259. sec. 8.) is not to be extended by construction.

A judgment entered up by confession on a warrant of attorney, without any *specification* of the particulars of the debt being filed, is good as against the debtor himself, and is to be deemed fraudulent, only as respects other *bona fide* judgment creditors, and *bona fide purchasers* for a valuable consideration, that is, *purchasers*, in the usual and popular sense of the term, as distinguished from creditors.

A voluntary conveyance, therefore, made by a debtor, of his real estate, on a nominal consideration, in *trust*, to sell the same, and out of the proceeds to pay all his creditors who should come in and prove their debts and execute releases of their demands, is not entitled to a preference over a previous judgment entered up by confession, but without the *specification* required by the statute.

THE bill, filed *May* 22, 1821, stated, that on the 22d day of *September*, 1820, *J.* and *Z. Taylor* executed and delivered to the plaintiffs, a deed which recited that they were indebted to several persons in a large sum of money, which they were unable to pay, "by reason of the unsaleableness of their real estate, at present, without a very great sacrifice," and that they were willing to do equal justice to all their creditors, as far as might be in their power; they, therefore, in consideration of one dollar, granted to the plaintiffs, their real estate therein described, in fee, in *trust*, to sell the same at public or private sale, and in such parcels, and at such prices, and upon "such terms of payment, and to take such security, as they should deem most beneficial for the interest of the creditors; and that they should apply the proceeds towards payment of all their debts, "which should be proved, to the satisfaction of the plaintiffs, to be justly due and owing, in proportion to the amount of *July* 10*th*.

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such debts:" But upon the condition, that each creditor to whom such payments should be made, "should seal and deliver a full and complete discharge of this demand." The plaintiffs then covenanted "to account for the overplus moneys to the grantors." That at the time of the execution of the deed, the plaintiff *S.* was holden as endorser of a promissory note, dated 16th *December*, 1819, for 6,000 dollars, payable in six months, and which note was made for the sole accommodation of *J.* and *Z. T.* and was by them negotiated. That the note was due and unpaid, and the plaintiff *S.* duly fixed as endorser, and had been sued. That *J.* and *Z. T.*, previous to the 28th of *November*, 1819, executed to the defendants a bond for 43,954 dollars, and a warrant of attorney to confess judgment; and on that day a judgment was entered on the bond. That the defendants did not file a *specification* of the nature and consideration of the debt, within the meaning of the act, entitled an act to "prevent abuses in the practice of the law, and to regulate costs in certain cases," *passed April* 21, 1818; and no such particular statement and specification was filed until after the execution and delivery of the said deed. That the defendants, on the 18th of *August*, 1820, issued an execution on this judgment, and the sheriff had levied upon the land so conveyed to the plaintiffs. That the defendants stipulated with *J.* and *Z. T.*, that they could not issue execution for seven years, if *J.* and *Z. T.* requested that length of time to enable them to settle with their creditors. That such request has been made and disregarded. *Prayer*, that the defendants be enjoined from selling, and be decreed to release their interest to the land under the judgment, &c.

The answer (filed *May* 22d, 1821) stated the origin and amount of the debt of the defendants, against *J.* and *Z. T.* the judgment bond, and the judgment as charged; and the defendants insisted, that the original specification was legal

and valid, and that their judgment was a valid lien, and had preference to the deed given to the plaintiffs. That they knew nothing of that deed; and they charged *J.* and *Z. T.* with fraud, and denied any promise to delay execution, &c.

T. I. Oakley, for the defendants, now moved to dissolve the injunction, and insisted that the deed to the plaintiff was not a *bona fide* conveyance within the statute. He cited 14 *Johns. Rep.* 458. 15 *Johns. Rep.* 555.

Paine, contra. He cited 1 *Binney*, 502. *Prec. in Ch.* 310. 2 *Johns. Ch. Rep.* 182. 5 *Term Rep.* 238. 15 *Johns. Rep.* 571. 2 *Binney*, 174. 3 *Esp. N. P. Rep.* 228.

THE CHANCELLOR. The judgment without a specification was good, as against the debtor, and a lien upon his lands. When the statute (21st of *April*, 1818, *ch.* 259. *sec.* 8.) says, "such judgment shall be deemed fraudulent as respects any other *bona fide* judgment creditors, and every *bona fide* purchaser for a valuable consideration," it refers, as I apprehend, to purchasers taking beneficially, and for a valuable consideration, on their own account. It did not mean that the debtor might make, in despite of the judgment, voluntary assignments for his own benefit, or to prevent his property from being sold on execution, or to pay particular or favourite creditors. The only creditors mentioned in the act are *judgment creditors*. *Purchasers* are there mentioned, in contradistinction to creditors, and the word is used in the common and popular sense. The plaintiffs in this case were not purchasers, in the sense of that act, for a *valuable* consideration. They paid no valuable consideration. It was a voluntary conveyance in trust for creditors, generally; and the statute defines the particular class of creditors who were to have preference over such a defective judgment; and those for whose benefit the conveyance was made and intended in

A judgment entered on a warrant of attorney, without a *specification*, is good against the debtor; and is void only under the statute, against judgment creditors, and *purchasers* for a valuable consideration, in the popular sense of the term.

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this case, were not of that description. Though judgment creditors might be included in the general description of creditors; yet that class was not the particular object of the deed, nor did they stand in need of such a provision, for their rights rested upon a better basis. The act ought not to be extended by construction; and the ordinary lien of the judgment creditor, who might happen, through inadvertence, or through the error of counsel, to omit as particular a specification as the act required, ought not to be impaired, except in favour of those particular persons who can bring themselves, clearly and strictly, within the letter, and within the meaning and policy of the exception.

The particular provision in the deed, that the creditors were not to be paid in proportion, &c., unless they should execute and deliver a complete discharge of their demands, was in this case rigorous, coercive, and unjust, for the deed only assigned the real property therein specified. It did not extend to all the property, real and personal, of the grantors, and *non constat*, they had no other property. They might have had other and sufficient property, both real and personal. The land in question might not pay one fourth of the respective debts, and yet the creditors were not entitled to receive a cent, unless they relinquished the residue of their debts. The condition was oppressive, and without any colour of justice in this case, inasmuch as the assignment was not general of all the property, but only of a specified part. A partial assignment upon such a condition is pernicious in its tendency, if it be not (as I rather apprehend it to be) fraudulent in its design.

A conveyance by a debtor of certain lands, in trust for all his creditors who should come in and release their demands, is fraudulent.

The deed likewise authorized the trustees to sell the property forthwith, in their discretion, and turn the land into money; and if the creditors would not accept of their rateable payments upon the condition imposed, the moneys were to be held in trust for the grantors. By this means the defendants might lose their lien upon the land, as against the debtor, and it might become converted into money, to

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be placed at his disposal. Such a consequence could not be endured, and yet it flows naturally from the provision in the deed. A power of coercion over the creditor, with the reservation of such a resulting trust to the grantor in case the coercion should not be successful, was deemed by the Supreme Court, in *Hyslop* v. *Clark*, (14 *Johns. Rep.* 458.) to be a badge of fraud, and not a fair and lawful assignment.

I am, accordingly, of opinion, that the deed in question is not entitled to be preferred to the judgment lien of the defendants, and that the motion to dissolve the injunction ought to be granted.

Injunction dissolved.

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WESTCOTT v. CADY.

WESTCOTT and others *against* CADY and others.

A bill of revivor and supplement, is a compound of a supplemental bill and bill of revivor, and not only continues the suit which has abated by the death of a plaintiff, &c., but supplies any defects in the original bill arising from subsequent events, so as to entitle the plaintiff to relief on the whole merits of his case.

Where letters of administration, under the *seal* of the Court of Probates, in due form of law, are produced, this Court will deem them to be regular and valid, without looking beyond them.

A will and codicil are to be taken and construed together, as parts of one and the same instrument.

A limitation over of personal goods and chattels, or money, in remainder, after a bequest for life, is good.

Where a testator devised all the rest and residue of his estate to his brother and sister, "to them and their heirs for ever; all the children of his said brother and sister, to have an equal share in every thing he left; and if his brother died without children, the children of his sister should enjoy the whole equally:" *Held*, that the brother and sister took as tenants in common, not as joint tenants.

A legatee in remainder, after an estate for life, may call on the legatee for life for an inventory of the property devised, to be filed.

May 4th and July 14th.

THE bill of *revivor* and *supplement* in this cause, was filed by *John Westcott* and *Susannah* his wife, (late *S. Wood*,) and *James Westcott* and *Mary* his wife, (late *M. Wood*,) administrators of *Charles Chinn*, deceased, (the said *Susannah* and *Mary* being next of kin to *C. C.*, the intestate, and, as children of *Sarah Wood*, deceased, devisees under the will of *Edward Chinn*, deceased,) against *Daniel Cady* and *John Willard*, as executors of the last will and testament of *Margaret Chinn*, deceased. It stated that the plaintiffs filed their original bill against *Margaret C.*, widow and executor of *Edward C.*, deceased, for a discovery and account of the real and personal estate of *Edward Chinn*, and that she might come to a just account as to the personal estate; and that the same might be applied, in the

course of administration, and the plaintiffs be paid the share to which they were entitled, in right of *Susannah* and *Mary Wood*, by virtue of the will of *Edward Chinn*, deceased, &c. That *Margaret Chinn* appeared to the original bill, and answered; and that she, afterwards, on the 15th of *November*, 1820, died; and by her will, dated the 8th of *June*, 1819, made the defendants executors, and directed that such sums as were requisite to pay or extinguish the claims of the plaintiffs, should be paid out of the residue of the estate. That the plaintiffs are entitled, in virtue of the devise over in the will of *Edward C.*, deceased, and the codicil thereto, or in right of *S.* and *M.*, or as administrators of *C. C.*, deceased, or in right of *S.* and *M.*, as his next of kin, to the possession of all the personal estate of *E. C.*, deceased, except the specific portions of the real and personal estate devised and bequeathed by him. The plaintiffs *prayed*, that the defendants might either admit assets of *Margaret C.*, deceased, sufficient to satisfy the demands of the plaintiffs, or that they set forth a true account of the personal estate of *M. C.*, and its value; and that they be decreed to apply sufficient of the proceeds thereof, to satisfy the demands of the plaintiffs; and for general relief.

The *answer* of the defendants, filed *March* 10th, 1821, admitted the original bill, filed *December* 15th, 1817, as stated, and that *Margaret C.* put in an answer thereto, on the 17th of *April*, 1818; that she died *November* 15th, 1820, having made her will, by which the defendants were appointed her executors; that *M. C.* devised the residue of her estate, as stated in the bill of the plaintiffs, subject to debts, expenses, &c., and subject to the power given to the defendants, as her executors, &c., to settle with the plaintiffs, on just terms; and that she directed that all such sums as the defendants should pay, to settle or extinguish the claims of the plaintiffs, should be paid out of the residue of her estate. The defendants insisted, that the plain-

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tiffs are *not entitled to any share of the personal estate of which Edward C. died possessed or entitled*, but that the whole belonged to *Margaret C.*, as devisee, legatee, widow, executrix, and creditor of *Edward C.*, deceased. They denied that they have had, or have possession of any part of the real estate of *Edward C.*, and they disclaimed all interest in, or claim thereto, but they did not admit that the plaintiffs were entitled to it. They admitted, that they had qualified as executors, and possessed themselves of the personal estate, which they believed sufficient to satisfy any just and valid demand of the plaintiffs; but they did not admit sufficient assets, because they did not know, with certainty, the amount: That they were ready to account as executors, &c., as the Court should direct, and they submitted that the suit abated by the death of *Margaret C.*, might stand revived against them as executors.

Margaret Chinn, in her *answer* to the *original* bill, admitted that *Edward C.* made his will, on the 13th of *May*, 1800, and gave "to his wife, *Margaret C.*, 500 dollars, to be paid to her, yearly, during her life, from the interest of his loan office certificates; that he gave to her all the stock and farming utensils, on his farm, and all his household furniture and servants; and devised to her his farm at *Claverack*, during her natural life; and all the rest and residue of his estate, not otherwise devised in the will, in what place or of what kind soever it might be, he gave to his brother, *Charles C.*, and his sister, *Sarah Wood*, to them, and to their heirs forever. The *reversion* of the annuity of 500 dollars, to be paid to his wife, *Margaret C.*, during her life, and the *reversion* of the *Claverack* farm, devised to her for life, at her death, he gave to his said brother and sister in fee: all the children of his said brother and sister to have an equal share of every thing he left; and if his brother died without children, the children of his sister should enjoy the whole between them equally.

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He appointed his brother *Charles* and his sister *Sarah Wood*, *Jacob Vanderheyden*, and his wife's brother, *James Livingston*, and *Joseph Binden*, his executors. He directed that an account of his estate in *America* be sent, as soon as possible, to his said brother and sister in *England*, and that his executors send the surplus revenue of his estate, after paying his wife the said annuity of 500 dollars, and other necessary expenses, to his said brother and sister, or to their children, annually." The answer of *M. C.* further admitted, that *Edward C.* on the 4th of *August*, 1802, made a *codicil* to his will, in which he stated, "that he had, since making his will, sold his *Claverack* farm, which he had left to his wife *Margaret*, as therein stated, and that the estate, by the sale, had become *personal* property; and it being his desire that his wife should have the *income*, *profit*, *use*, and *enjoyment* of that estate, during her life, he bequeathed to her, during her natural life, to take and enjoy the principal and interest due to him on the sale of that estate; and he, also, gave her, during her natural life, the use, interest, and enjoyment of all the moneys he had in possession, and all the interest he has in the funds or stocks of the United States, &c. That his executors should draw for these moneys for the use of his wife, and invest her with full power to receive and manage the same, during her natural life, and to discharge his funeral expenses out thereof, and to have, enjoy and manage, to her own best advantage, for and during her natural life, all his estate, moneys, and personal property aforesaid; and he appointed her executrix." The answer further admitted, that the testator died *August* 17th, 1802, and that she (*M. C.*) administered and possessed herself of the personal estate, and the securities and deeds relative to the real estate. She admitted the death of *Sarah Wood*, in the lifetime of the testator, leaving the plaintiffs *Susannah* and *Mary*, her next of kin, and heirs at law. That *Charles C.* died on the 10th of *December*,

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1802, leaving the plaintiffs, *S.* and *M.*, his next of kin and heirs at law. She denied that the plaintiffs had administered on the estate of *Charles C.*, by letters of administration taken out in this state; though such letters may have been made, yet the plaintiffs had not appeared and qualified; and, therefore, have no authority to sue as administrators. That the plaintiffs are *aliens*, and residents in *England*, and have never been in this state, and cannot administer on the personal estate of *Charles C.*, deceased. She admitted the *letter* written by her, as stated in the bill, addressed to *Charles Chinn*, and to *John* and *James W.*, plaintiffs, and that the letter inclosed such account, as charged in the bill, and which account was made by the executor *J. Vanderheyden*, without her directions. She admitted the *marriage contract* referred to in the said letter and account, and that it was the only marriage contract ever made between her and the testator. That the 3,000 pounds mentioned in that contract, consisted in the loan office certificates, which she believed were less valuable than specie. That she married the testator on the 10th of *July*, 1779, and the testator took possession of the 3,000 pounds mentioned in the marriage contract, and managed it as he thought proper. That on the 5th of *January*, 1791, the testator procured a certificate to be issued in the name of his wife, the defendant, of three per cent. stock, for 282 dollars and 87 cents; another certificate, on the 15th of *May*, 1797, for 600 dollars; and one other certificate, on the 22d of *May*, 1798, for 800 dollars; and the defendant had received the interest on those securities, amounting to 1,682 dollars and 87 cents, to her own use. That she did not recollect but that the testator may have been consulted about the management of the 3,000 pounds. She admitted, that the 196 pounds, credited in the said account, on the marriage contract, was intended as the value of the stock, the certificates of which were so issued in her name.

She denied that she ever received any other payment on the marriage contract than the said stock. She stated, that soon after the testator's death, she caused an *inventory* to be made, in order to be filed, but that she destroyed it without filing it, as she was advised that the whole personal estate belonged to her. She set forth the real estate of which the testator died seized; and alleged that the plaintiffs are all aliens, and not entitled to any part of the real estate, as heirs of *Charles C.*, or of *Sarah Wood.* That besides furniture, the testator owned, at the time of his death, 26,181 dollars and 76 cents in three per cent. stock, &c. (setting forth specifically the assets.) That after paying funeral expenses and rent, she had used and managed the residue of the personal estate to her own best advantage; and she denied any right of the plaintiff to those moneys: she insisted that if the testator did devise any *reversionary* interest therein after his death, which she denied, it was to *Charles C.* and *Sarah W.*, and that as *Sarah W.* died *before* the testator, *Charles C.* took the whole as *survivor*, and that the devise over to the children of *Sarah W.*, in case *Charles C.* should die without children, was void; and the plaintiffs had no interest therein, as next of kin to *Sarah W.* or to *Charles C.* That no person can make title but as executor or administrator of *Charles C.* That the plaintiffs never applied to her, before filing their bill. That the bill did not pretend that *Charles C.* died intestate, and that, therefore, she could not pay over to the plaintiffs, without indemnity: But she insisted that by the will and codicil, she was entitled to the whole of the personal estate of the testator.

The *letter* referred to in the original bill, and admitted in the answer of *Margaret C.*, which was exhibited, was dated *October* 16th, 1802, and directed to *Charles C.* and *John* and *James Westcott.* In that letter, she mentioned that she had sent a copy of the will and an account current; and she stated a marriage contract, wherein her husband

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gave, by deed, to *Leonard Gansevoort*, 3,000 pounds, in trust for her use, with interest thereon; that she had received only 196 pounds thereof, and offered to relinquish to them the lands and the stock in the funds, on being paid the above sum specified in the marriage contract.

The *account current*, also exhibited, contained the same admissions of assets as were made in the answer. The plaintiffs, also, exhibited *letters of administration*, granted to them, by the Judge of Probates of *New-York*, on the 17th of *December*, 1817, on the goods, chattels, credits, &c. of *Charles C.*, deceased.

May 4th, 1821. The cause was this day brought to a hearing, on the bill and answers, and exhibits referred to in the pleadings: and was argued by *M. Van Buren* and *W. A. Duer*, for the plaintiffs, and by *Henry* and *D. Cady*, for the defendants.

The plaintiffs' counsel waived all claim to the lands or real estate of the testator, and contended, 1. That by the will and codicil of *Edward C.*, his wife, *Margaret C.* became entitled to the income of his estate, *during her life only*, subject to account to those entitled to the reversion. (1 *Vesey*, 187. 1 *Vesey, jun.* 407. 1 *P. Wms.* 425. 2 *Vesey*, 626. *Ambl.* 30. 1 *Co.* 157. 174. *Digges's Case*, 2 *Co.* 33. 3 *Bro. C. C.* 543. 5 *Vesey*, 248. *Powell on Devises*, 248. 265. 3 *Leo.* 71. 1 *Salk.* 240. 10 *Vesey*, 370.)

2. That the residue and reversion were devised over to *Charles C.* and *Sarah W.*, the brother and sister of the testator, and that this disposition was good by way of executory devise. (*Fearne on Ex. Dev.* 4 *ed. by Powell*, 26. 3 *Bro. Ch. Cas.* 515. 6 *Bro. P. C.* 354.)

3. That *Charles C.* having died without issue, and intestate, the plaintiffs, being the only children of his sister *Sarah*, are entitled to the personal estate, *first*, as *administrators* of *Charles C.*, under an appointment by competent authority,

unrevoked and irrevocable, in this collateral manner, or in this Court: *secondly*, under the limitation over in the will of *Edward C.*: *thirdly*, as the next of kin of *Charles C.* (*Cro. Car.* 8. *Toller's Law of Ex.* 89. *Fearne, Ex. Dev.* 4 *ed.* 21. 182. 281. 531. 10 *Johns. Rep.* 16. 1 *P. Wms.* 356. 3 *P. Wms.* 372. *Poltexf. Rep.* 54. 2 *Wils.* 29. *Fearne's Contin. Rem.* 364. 552. 6 *ed.* 3 *Johns. Cas.* 109. 4 *Johns. Rep.* 75.)

For the defendants, it was contended, 1. That the plaintiffs, on their bill of *revivor*, were entitled to no other relief than what they were entitled to under the *original bill*; and that, by the will and codicil, all the personal property was given by the testator to his wife. (*Toller's Ex.* 66. 93. 250. 1 *Maddock's Ch.* 182. 2 *Fearne*, 35.)

2. The plaintiffs are not entitled to a decree against the testatrix of the defendants, but only to a *discovery* of the personal estate.

3. That the plaintiffs cannot claim the property in dispute, as *administrators* of *Charles C.*, deceased; nor can they be regarded as such administrators, because, being *aliens*, always residing in a *foreign* country, they never could have qualified as such.

4. Although the personal estate was bequeathed to the defendants' testatrix, for and during her natural life, yet as it was not bequeathed over, she took it *absolutely*, as legatee.

5. The general residuary clause in the will, cannot operate as a bequest over of the property bequeathed to the defendants' testatrix for life, which is the main point in the cause.

6. Where the personal estate bequeathed to one for life, is of that character, that the first use must produce its destruction, or compel the legatee for life to part with it, any bequest over must be void. There is no case to be found, of a general limitation over, or where the general residuary

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clause was applied to a chattel, after an express bequest of it for life. (*Shep. Touchst.* 411. note. 2 *Vern.* 59. 322. 445. 1 *P. Wms.* 503. 666. and note. 3 *Vesey*, 5. 2 *Bro. C. C.* 127. 4 *Vesey*, 716. 3 *Atk.* 486. 366. 2 *Vern.* 293. 3 *Mod.* 229. 1 *Atk.* 546. 2 *Vesey*, 653. 3 *Vesey*, 119. 2 *Vern.* 39. 59. 10 *Vesey*, 465. 1 *P. Wms.* 748. 3 *Vesey*, 311. 1 *Vesey*, 9. 1 *P. Wms.* 651.)

7. If the words, "for and during her natural life," create a limitation as to the personal estate bequeathed, so that there was a residue undisposed of, the executor and executrix of *Edward C.* would take that residue, beneficially; or the defendants' testatrix would be entitled to one half of it, under the statute of distributions.

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THE CHANCELLOR. The cause was brought to a hearing upon the bill of revivor and supplement, and the exhibits referred to in the pleadings.

A bill of *revivor* and *supplement* is a compound of a supplemental bill and bill of revivor, and not only continues the suit, which has abated by the death of a plaintiff, &c. but supplies any defects in the original bill, arising from subsequent events, so as to entitle the plaintiff to relief on the whole merits of the case.

1. The first question is as to the extent of the relief to which the party may be entitled, under these pleadings. The defendants contend, that the plaintiffs can have no other relief, than what they were entitled to under the the original bill, and that under that bill, they were entitled only to the exhibition of an inventory from *Margaret China*. The original bill went further, and prayed not only for an account of the estate of *Edward China*, dec., but that the same might be applied in a course of administration, and the plaintiffs paid the proportion or share of the estate, to which they were entitled under the will of *E. C.* But the present bill is not only a bill of revivor, made necessary by the death of *M. C.* the original defendant, but it is a bill of revivor *and supplement*, and sets forth the new rights accruing to the plaintiffs by the death of *M. C.*; and the defendants, by their answer submit to account, and to the revival of the suit.

A bill of revivor and supplement not only continues the

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suit, upon abatement; but it supplies defects arising from some event subsequent to the institution of the suit. It is a compound of a supplemental bill and bill of revivor, and in that character, it states the original bill, and proceedings thereon, and the subsequent event; and it states also the consequent alteration or acquisition of interest, with respect to the parties. (*Red. Tr.* 33. 74.) I apprehend, that the plaintiffs can obtain, under the present pleadings, all the relief, which the facts and the merits of the case will authorize.

Where letters of administration under the seal of the Court of Probates, in due form, are produced, this Court will deem them to be regular and valid without looking beyond them.

2. Another objection, of a technical kind, is, that the plaintiffs are aliens, and residents in *England*, and that they have not qualified themselves, according to law, to sue here as administrators. The answer to this is, that letters of administration, under the seal of the Court of Probates of this State, are produced, and I am bound to presume *omnia rite acta*, and to give full credit to the judicial acts of a competent jurisdiction. I am not to look beyond the letters of administration *sub pede sigilli*. Lord *Talbot*, in *Tourton* v. *Flower*, (3 *P. Wms.* 370.) observed, in answer to an objection to the validity of the administration, "here being an administration taken out of the Archbishop's Court, I will look upon the same to be good."

3. Having disposed of these preliminary objections, we come to the consideration of the real merits of the claim of the plaintiffs.

A will and codicil are to be taken and construed together as parts of one and the same instrument.

Their rights depend upon the construction to be given to the will and codicil of *Edward Chinn*. I shall take it for granted, as a clear and settled rule, (see, for this purpose, *Willet* v. *Sandford*, 1 *Vesey* 186.) that a will and codocil are to be taken and construed together, in connection with each other, as parts of one and the same instrument. The intent of the testator is to be gathered from the whole, and a codicil is no revocation of a will, further than it is expressed.

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The will gave to the testator's wife, *M. C.*, an annuity, for life, of 500 dollars, to be received and paid to her, yearly, from his loan office certificates, and it gave to her certain specific chattels, as farming utensils, household furniture, and servants, absolutely, and it gave to her, for life, the rents and profits of a farm at *Claverack*. ALL *the rest and residue of his estate, real and personal, not otherwise devised in the will, in what place or what kind soever it might be*, and including expressly the *reversion of the annuity of* 500 *dollars and the reversion of the Claverack Farm*, he gave to his brother *Charles Chinn*, and his sister *Sarah Wood*, and *to them and their heirs forever*. He further declared that all the children of his said brother and sister should have an equal share of every thing he should leave, and that if his brother died without children, *the children of his sister should enjoy the whole between them equally*.

It is admitted, that the sister, *Sarah Wood*, died before the testator, and that the plaintiffs, *Susannah* and *Mary*, are her next of kin, and heirs at law, and that *Charles Chinn* died after the testator, and that the plaintiffs, *S.* and *M.* are also his next kin, and heirs at law.

Upon the will, as it thus originally stood, there could not have been a doubt, but that *C. C.* and *S. W.* and their representatives, took the remainder of the loan office certificates, after her death, and that she was only to have an annuity of 500 dollars, during life, out of the interest or dividends of that stock. The testator evidently intended by the words, *loan office certificates*, his three per cent stock, of the *United States*, and the bequest over, after that annuity ceased, was clearly good. There could have been no more difficulty upon this part of the will, as to the stock, than as to the remainder in fee of the *Claverack* farm, after the life estate therein had ended. The more colourable ground of resistance to the claim of the bill, is derived from the codicil. In that, the testator states, that since the date

of his will, he had sold the *Claverack* farm, and turned it into personal property, and it being his desire, that his wife should have the "income, profit, use, and enjoyment of that estate during her life," he accordingly bequeathed to her, "during her natural life," the principal and interest due him on the sale of that estate. The codicil not only, so far, substituted the use of the proceeds, instead of the use of the farm; but it went further, and gave to her, "*during her natural life, the use*, interest, and enjoyment of all the *moneys* he had in possession, and all the interest he had in the funds or stock of the *U. S.* and public securities;" and the executors were directed to draw for those moneys "*to and for the use of his wife*," and to invest her with full power to receive and manage the same, "for and during her natural life;" and out of these moneys, to discharge his funeral expenses, and that after those expenses were paid, that she should "have, enjoy, use, and manage, to her own best advantage, for and during her natural life, all and singular his estate, moneys, and personal property above mentioned."

The gift, by the codicil, to the wife, of an interest for life in the moneys and stock, as well as in the proceeds of the *Claverack* farm, does not affect or impair the devise over in and by the will. There is no incompatibility between the bequests in the codicil and the devise over in the will; but the codicil pursues the intention of the will in confining the use of the *Claverack* estate to her life; and it only enlarges the *quantum* of interest which she was to enjoy for life, by exchanging the annuity of 500 dollars, for life, chargeable upon the public stock, for the use for life of all his cash in hand, and of all his government stock. It is still but the use *for life*, and this is the express limitation, repeated again and again, in the codicil, and the intention is too explicit to be mistaken. The devise over by the will, of the remainder of the testator's interest in the personal estate,

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after the termination of the life estate or interest therein, is left undisturbed, and is not affected by any of the provisions in the codicil, and cannot be deemed to be revoked. The codicil is a revocation of the will, *pro tanto* only, and as far as the provisions in the one are inconsistent with those in the other. In every other respect, the original will remains in full force; and if the remainder over to the brother and sister of the testator was valid, in the first instance, it was equally so after the publication of the codicil.

A limitation over of personal goods and chattels, or money, in remainder, after a bequest for life, is good.

The law is too well settled to be drawn into question at this late day, that a limitation of personal goods and chattels or money in remainder, after a bequest for life, is good. In *Randall* v. *Russel*, (3 *Merivale*, 190.) The testator gave his farm, and stock, and crop thereon, to his wife during her natural life, if she should continue so long unmarried. The Master of the Rolls observed upon the case, that originally, by the *English* law, there could be no limitation even of a chattel, but a gift for life carried the absolute interest. Then a distinction was taken between the use and the property. The use might be given to one for life, and the property, afterwards, to another. A gift for life of a chattel was now construed to be a gift of the usufruct only. He referred to what Lord *Alvanley* had said, in *Porter* v. *Towney*, (3 *Vesey*. 311) that there had been great doubt what a person having a limited use of articles, (as corn, hay, &c. of which the use consists in the consumption,) must do. He conceived that a gift for life, if specific, of things *quæ ipso usu consumuntur*, was a gift of the property, and that there could not be a limitation over after a life interest in such articles. When the use and the property can have no separate existence, the old rule must prevail, and a limitation over after a life interest, is void.*

*See *ante* p. 21 *Gillespie* v. *Miller*.

The rule of equity and the exception to that rule are both clearly stated by Sir *William Grant*, in that case, as late as 1817; and it is very clear, that the rule applies to the present case, and that the present case does not fall within the exception.

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Nor is this a very modern rule, for we find it settled upwards of a century ago.

In *Smith* v. *Clever*, (2 *Vern.* 59. 2 *Ch. Rep.* 187. *S. C.* under the title of *Smith* v. *Fisher*,) it was held, as early as 1688, that money might be limited and devised over by will after a bequest of it for life; and the same point, even in respect to money, was admitted, in *Pleydell* v. *Pleydell*, (1 *P. W.* 748.) In *Hyde* v. *Parratt*, (1 *P. W.* 1.—2 *Vern.* 331. *S. C.*) in 1695, it was held by Lord Ch. *Somers*, that a devise of goods to the wife for life, and, afterwards, to the testator's son, was a good devise over, and as valid as if the devise has been only of the use of the goods to the wife for life. The case received great discussion, and the Chancellor was said to have followed some recent precedents which had adopted the civil and canon law, in construing the use of the thing, and not the thing itself, to pass where the first devise was for a limited time, in order the better to comply with the intention of the testator. The bill was filed, in that case, by the person in remainder against the wife and the executor, for an inventory, and that the widow should give security to have the goods forthcoming at her death. Afterwards, in *Tissen* v. *Tissen*, in 1718, (1 *P. W.* 500.) Lord *Parker* observed, that the rule then was established, that a bequest of a chattel interest for life, passed only the use and property, and not the thing itself. So, again, in *Upwell* v. *Halsey*, (1 *P. W.* 651.) there was a devise of such part of the testator's *personal estate as his wife should leave of her subsistence*, to his son; and the devise over was held good. The Master of the Rolls said, it was established that a *personal thing* or *money*, might be devised to one for life, with remainder over. In that case, the second husband was decreed to account for what had come to his hands, after allowing what had been applied to his wife's subsistence.

The old rule itself was strongly insisted on by the Attorney General, in *Clarges* v. *Albemarle*, (2 *Vern.* 245.) in

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1691; and yet in that case, as well as in *Hyde* v. *Parratt*, the distinction between a devise of the personal chattel itself to one for life, remainder to another, and the devise of the use thereof to one for life, with remainder over, was exploded; and it was held that it amounted to the same thing whether the devise was the one way or the other; for the testator's intention appeared to be the same in both cases, and ought equally in both cases to prevail.

If the codicil stood alone, unconnected with the preceding will, then, indeed, the rule insisted on by the counsel for the defendants, that a devise of dividends or interest or produce of stock, &c., *without limitation*, carried the principal or whole interest, might have applied. But as the codicil and will are to be taken and construed together as one connected will, the will has no application.

Where a testator devised all the rest and residue of his estate, &c., to his brother and sister, and to them, and their heirs for ever. All the children of his said brother and sister to have an equal share of every thing he left: and if his brother died without children, the children of his sister should enjoy the whole equally: *Held*, that the brother and sister of the testator took as tenants in common, not as joint-tenants.

It may be made a question, whether the remainder over to the brother and sister of the testator, was to them in joint-tenancy or in common. If the will had stopped with the bequest of the rest and residue of his estate, real and personal, to his brother and sister, "to them and to their heirs forever," it would have been a joint-tenancy. In *Campbell* v. *Campbell*, (4 *Bro.* 15) the Master of Rolls accurately reviewed the cases, and arrived at the conclusion, that where a legacy was given to two or more persons, without any other words to lay hold of to change the construction, they were joint-tenants. But almost any expression, or words denoting a different intention, will alter the construction. In this case, the testator added, that all the children of his brother and sister were to have "an equal share" of every thing he left, and that if his brother died without children, the children of his sister "should enjoy *the whole* between them, equally." Those subsequent words explain the testator's intention to be, that the brother and sister should take equally, as tenants in common, for otherwise, their children could not have "an equal share;" and when it is said, that if his brother died without children, the chil-

dren of his sister should enjoy the *whole*, it seems to have alluded to the part which they otherwise would not have enjoyed, and to be founded on the idea of a severance of interest between the brother and sister, in the first instance.

If they took as tenants in common, then the plaintiffs, *S.* and *M.* are entitled to a moiety of the devise over, as heirs to their mother, *Sarah Wood*, deceased, and to the other moiety, as administrators of *Charles Chinn*, deceased, or as heirs and next of kin to him. In either capacity, they are entitled to his moiety of the estate. So, if the devise over to the brother and sister was a joint tenancy, then upon the death of *Sarah Wood*, the whole interest survived to *Charles Chinn*, and on his death, descended to the same plaintiffs. Therefore, *quacunque via data*, the right of the plaintiffs to sue for, and demand the whole of the personal estate of *Edward Chinn*, so accruing on the termination of his wife's life interest therein, is clearly established.

A legatee in remainder, after an estate for life, may call on the legatee for life, for an inventory of the property devised, to be filed.

The original bill seems to have been well founded. The plaintiffs were entitled to call for the exhibition of an inventory. Formerly the *cestui que trust*, or legatee entitled in remainder after an estate for life, was allowed to call upon the legatee for life, not only for an inventory, but for security that the goods should be forthcoming at his decease. (*Vachel* v. *Vachel*, 1 *Ch. Cas.* 129. and *Hyde* v. *Parratt*, *supra*. *Slanning* v. *Style*, 3 *P. Wms.* 334.) But the rule of practice has since been altered, on that point; and in *Foley* v. *Burnet*, (1 *Bro.* 279.) Lord *Thurlow* observed, that the Courts do not now require the tenant for life to give security, but only to exhibit an inventory to be filed.

I rather incline to think, that the plaintiffs were entitled to call upon *M. C.*, the executrix of *Edward Chinn*, deceased, for something more than the inventory; for her life interest does not seem to have extended to *all* the personal estate. It was the "estate, moneys, and personal property above mentioned;" and no part of the personal property had been

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previously mentioned in the codicil, but the proceeds of the *Claverack* farm, and the money in hand, and the public stock and securities. The bank and turnpike stock owned by the testator, were not included in that description; and the better opinion is, that they passed, at once, upon his death, by the residuary bequest.

I shall, accordingly, declare, that the plaintiffs are entitled to an account of the personal estate of the testator *Edward Chinn*, and which came to the hands and possession of his widow, *Margaret Chinn*, and from her has come to the hands and possession of the defendants; and that they are entitled, out of the assets of *M. C.*, in their hands, to payment of the capital or principal, without interest, of the moneys and stock devised by *E. C.* to the said *M. C.*, his widow, for her life, being the proceeds of the sale of the *Claverack* farm, and being the moneys which the said *E. C.* had in possession at his death, and being the amount of the funds, or public stock owned by *E. C.* at his death, or if the stock has not been sold, then to an assignment of the same; and that they likewise account and pay over to the plaintiffs the value, if sold, and if not, to assign over the turnpike and bank stock, admitted by the said *M. C.* to have been part of the assets of her testator, and to account for the dividends and capital received, with interest, &c. And I shall direct a reference to a master, to take the account accordingly, and to make all just allowances to the defendants or executors of *M. C.*, who was executrix of *E. C.*, and to take such examinations and proofs, as are usual in such cases, and to report, &c. and the question of costs, and all further questions are reserved, &c.

Decree accordingly.

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SKINNER *against* DAYTON and others.

The plaintiff and others formed an association for manufacturing, &c. and executed articles of agreement, as to the mode of managing and conducting their business: *Held*, that the company could only act by a resolution of the board of directors, or by a general agent, duly appointed, pursuant to the articles of their association; and that the plaintiff, who had been elected *president* and was, *ex officio*, a director, having entered into a contract, under his hand and seal, in behalf of the company, without such authority from the board of directors, or the consent of the members, it did not bind his associates, but, the plaintiff was personally and individually liable.

Where the plaintiff, who had so entered into a contract with the defendants for machinery to be made for the company, afterwards, gave notice to them, that the company would not proceed, and that the contract was abandoned on their part: *Held*, that the defendants were entitled to recover damages for the work done, and materials furnished, by them, pursuant to the contract, and also for the loss and injury actually sustained by them, in consequence of the abandonment of the contract by the plaintiff; and that they were not to be delayed in their right to have the damages assessed and levied, by judgment and execution, until the question of *contribution* between the plaintiff and his associates was settled.

But, it seems, that the plaintiff, in such case, having acted without authority of the directors, or of the members of the association, is not entitled to call on the company or any of his associates to contribute to the damages.

April 11*th*, *and July* 16*th*.

THE original bill, filed the 28th of *September*, 1816, by the plaintiff, against *John White*, *Marvin White*, *Rudolph Taylor*, *Abraham Dayton*, *Reuben Wheeler*, *William Raymond*, *jun.*, *Nathan H. Raymond*, *Abner P. Hitchcock*, and *Nathan Doane*, stated that the plaintiff, and *Dayton*, *Wheeler*, *W. Raymond*, *jun.* *N. H. Raymond*, *Hitchcock*, *Doane*, and *Ira Hall*, on the 10th of *April*, 1815, by articles of agreement subscribed by them, called the constitution, formed an association together, for manufacturing cotton yarn and

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cloth, to be known and distinguished by the name of "The *Granville Cotton Manufacturing Company.*" An election for officers was to be held on the first *Monday* of *May*, in each year, who were to be chosen from among the stockholders, to wit, a *president*, who should be, *ex officio*, one of the directors, two, and not more than four, *directors*, and a *treasurer*: It was made the duty of the *president* and *directors* to appoint a *general agent*, whose duty it should be to purchase stock, and vend the goods of the company, and under the particular direction of the president and directors, to transact all such business, as they should deem best calculated to advance the interest of the company; also a *clerk*, whose particular duty it should be to keep an account, &c. The duty of the treasurer was to keep all deeds, records, vouchers, papers &c. receive and pay all moneys, &c. Each person, at the time of subscribing, was to pay on each share *ten* dollars, and from time to time, such assessments, as should be made by the president and directors, or forfeit such share or shares, with all previous payments made thereon; each stockholder to be entitled to one vote for each share: and the stock to be divided into twenty shares. This agreement was subscribed by the parties above named, and *White*, *Taylor* and *White* who took two shares. Under this agreement, the plaintiff was elected *president*, and *William Raymond, jun.* and *Abner P. Hitchcock*, directors, and *N. H. Raymond*, treasurer.

On the 25th of *April*, 1815, an agreement was entered into between "*White*, *Taylor* and *White*, of *Troy*, and *R. Skinner*, *W. Raymond, jun.*, *A. H. Hitchcock*, as directors of the *Granville Cotton Manufacturing Company*," by which *White*, *Taylor* and *White*, promised and engaged to make and deliver at the factory, to be erected in *Granville*, of the best materials, and best workmanship, *twelve* throssel frames, &c. (describing the machines,) to wit, six frames, in the month of *October* following, and six other

frames on the 1st of *May*, 1816; and the plaintiffs, *Raymond* and *Hitchcock*, in behalf of the company, engaged, to pay to *W.*, *T.* and *W.* 15 dollars for each spindle, or 15,120 dollars, as follows: 900 dollars in 35 days, and 500 dollars in every 30 days thereafter, until the machinery was in full operation, when the balance was to be paid. This agreement was signed and sealed by *W.*, *T.* and *W.* and by the plaintiff, "for the directors."

The bill stated, that the constitution of the company was made known to *W.*, *T.* and *W.*, before the execution of this agreement, and that they agreed to become subscribers for two shares, on condition of being employed by the company to make the machinery, provided that they should be exempted from any *assessment* made, or to be made, until the machinery was completed, and the factory in operation. That the president and directors raised, by assessment, about 1,100 dollars to pay for land purchased; and on the 27th of *April*, 1815, they laid another assessment on 18 shares of the stock, of 50 dollars each; that *J. H.*, *A. D.*, and *R. W.* paid their assessments, amounting to 350 dollars; but the other stockholders refused to pay, and thereby forfeited their shares, with all previous payments made by them. That the president and directors, in about three days afterwards, gave written notice to *W.*, *T.* and *W.* that by reason of these forfeitures, the company would not go on with their factory, and that the contract made with *W.*, *T.* and *W.*, could not be performed; and that *N. H. R.*, who delivered the notice, was told by them, or one of them, that they had made no contracts for the machinery, but had done something towards making the frames. (This, however, was denied in the answer.) The bill further stated, that since the forfeiture of the shares, the plaintiff had paid, out of his own funds, 217 dollars and 94 cents, which had not been reimbursed; that the company had become insolvent; that one of the associates had absconded, and another was in prison for debt; and that the copartnership was dissolved, and its debts were to be paid

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by *M. White*. That in *August*, 1815, *W.*, *T.* and *W.* brought a suit in the Supreme Court, against the plaintiff, for a breach of the covenants contained in the above mentioned agreement, alleging, for breaches, the non-payment of the 900 dollars in 35 days, and of 500 dollars on the 20th of *June*, and 500d ollars on the 20th of *July*, 1815. That the plaintiff pleaded the general issue, and specially, that the agreement was executed by the plaintiff and the two other directors, in their capacity of directors, and not otherwise; and that on a demurrer to this plea, the Supreme Court gave judgment against the plaintiffs.* That the appellant gave notice to the other partners, of the suit, but they declined doing any thing. That *Ira Hall* died the 18th of *September*, 1816, having, as he had heard, made a will, but that no letters testamentary or administration had been granted. The bill *prayed* for a discovery, and an injunction to stay all further proceedings at law, and for general relief.

* Vide 13 *Johns. Rep.* 307.

On the 26th of *January*, 1817, *Marvin White* filed his separate answer, stating that *Randolph Taylor*, *John White*, and himself, were partners in the business of making machinery for cotton manufactures. He admitted that he signed, in behalf of the firm, the agreement stated in the bill; he denied that he agreed or expected to look to the members of the association for the performance of it, on their part; but relied wholly on the liability and responsibility of the plaintiff, for the fulfilment of the contract. He admitted, that in *May*, 1815, *N. H. R.* delivered him a letter from the plaintiff and the two directors, stating that several shares had become forfeited, and that the remaining stockholders would be obliged to abandon the business, unless some alteration was made in the contract, and that *N. H. R.* was authorized to agree to such alteration; but he denied, that the letter contained any notice that the company would not go on, or that the contrrct made with the plaintiff would not be performed. He also denied, that he told *N. H. R.*, that they, *W.*, *T.* and *W.* had made no contracts for machinery, &c. but the

contrary. That no proposals as to alterations, were, afterwards, made by the plaintiff, or any other person. That immediately after the contract, he commenced the work on the machinery, and continued the work, until the 1st of *August* following, when he received a letter from the plaintiff, dated *July* 24th, which convinced him that the plaintiff did not mean to perform the contract; that this letter was the first notice *W.*, *T.* and *W.* had of the intention of the company not to go on, and which he considered as amounting to a notice of the abandonment of the contract, and a refusal to perform it. That the wages of the workmen employed on the machinery, at that time, amounted to 2,377 dollars and 34 cents, and the cost of the materials purchased, to 882 dollars and 66 cents. That when the letter was received in *August*, *W.*, *T.* and *W.* were solvent and in good credit, and would have executed the contract, if the plaintiff had performed on his part; and that their subsequent insolvency was produced by the losses sustained in consequence of the failure of the plaintiff to perform the contract on his part. That the work and materials finished, at the expense of 3,300 dollars, had become useless, and were not worth 400 dollars, &c.

On the 28th of *June*, 1817, *John White* filed his separate answer, which agreed, substantially, with that of *M. W. Dayton*, *Wheeler*, *W. Raymond*, *N. H. Raymond*, *A. P. Hitchcock*, and *N. Doane*, filed their joint and several answer, on the 13th of *January*, 1817. They all denied that the contract with *W.*, *T.* and *W.* was made with their approbation or consent, but, on the contrary, they had frequently expressed their disapprobation of it; and they denied that the plaintiff had any authority to make the contract in behalf of the company, or that he was the agent of the company, by any appointment as such. They all stated, that the company was indebted to them for advances out of their individual funds, the amount of which advances was stated by them respectively.

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On the coming in of the answers, a motion was made to dissolve the injunction, which had issued; and the Chancellor, after argument, on the 28th of *August*, 1817, ordered the injunction to be dissolved. (*vide S. C.*, vol. 2. p. 526.) The plaintiff appealed from this order, and the Court for the Correction of Errors, in *March*, 1819, reversed the decretal order, (*vide* 17 *Johns. Rep.* 357—373.) and decreed, that the injunction be continued until the hearing, on the appellant's confessing judgment in the suit at law, with leave to the respondents to enter up the same; and that proceedings be had in the Court of Chancery, either by a reference to a master, or an issue at law, to ascertain the damages, if any, sustained by the respondents, by the non-execution or rescinding of the contract, on the part of the appellant, and that the respondents levy those damages only on the execution; and that the record be remitted, &c.

Abner P. Hitchcock, afterwards, died, and the suit was duly revived against *Anna Hitchcock*, executrix, and *Phineas Hitchcock*, executor, &c. And *Ira Hall*, having died on the 18th of *September*, 1816, *Rebecca Hall*, his executrix, *John C. Parker*, *Clark Northrup*, and *Isaac Hollister*, his executors, were also made parties to the suit, and filed their answers on the 14th of *May*, 1818. They stated, that their testator, and they, as his executors, had paid above 1,900 dollars, on account of the company.

General replications were filed, and witnesses examined by both parties, and various exhibits proved.

Several witnesses testified that they heard *Hall*, *Hitchcock*, *N. H. Raymond*, *A. Dayton*, and *W. Raymond*, jun., express their disapprobation of the contract, the day on which it was made; and that they heard the plaintiff say, on that day, that he "had made a good day's work, and run the company in debt 15,000 dollars," or, as two of the witnesses testified, "that he had run the company in debt, that day, to the amount of 15,000 dollars, and that he did

not know how the company would like it;" and that *N. H. Raymond* immediately expressed his surprise and disapprobation. One of the witnesses stated, that there was an understanding between the company and *W.*, *T.* and *W.*, that the latter should give in their proposals, and allow the company ten days to consider of them; but the plaintiff concluded the contract on the same day it was made. One witness stated, that he was present when the contract was read in the presence of *Ira Hall*, before its execution, and he made no objection to it; and that he heard *W. Raymond*, jun. tell the plaintiff before the contract was executed, as he was going out, being in a hurry, that he should be satisfied with the contract the plaintiff should make. It was proved, by an exhibit in the cause, that *W. Raymond*, jun. had confessed, that he had used language from which the plaintiff had reason to believe, that he had his approbation and consent to make the contract, for he said to him, that after advising with *Hitchcock* and *Hall*, he must do as well as he could, and that he, *R.* would be satisfied. One of the witnesses deposed, that he heard *Hitchcock* say, that an assessment of 60 dollars on eighteen shares, had been laid by the directors, and that 50 dollars of the assessment was to meet the first instalment of the contract with *W.*, *T.* and *W.*

April 11th, 1821. The cause came on to be heard on the pleadings and proofs.

Henry, for the plaintiff, contended, that it should be referred to the Master, 1. to ascertain and report, *in what respects* the defendants, *White*, *Taylor* and *White*, had executed the contract of the 25th of *April*, 1815, mentioned in the pleadings, between them and the defendants, *Raymond* and *Hitchcock*, *as directors* of the *Granville Cotton Manufacturing Company*, and whether *W.*, *T.* and *W.* had sustained any, and what *damages*, by the non-fulfilment of the contract on the part of the company.

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2. That the Master, also, ascertain and report in what *proportion* the plaintiff, and the defendants, (except *W.*, *T.* and *W.*) respectively, should *contribute* to the payment of such damages.

3. That it should, also, be referred to the Master, to ascertain and report, whether there is any, and what *real estate*, and of what value, held by or in trust for the *Granville Manufacturing Company*, and who are entitled thereto, and in what proportions; and whether the same be susceptible of partition, and without prejudice to the owners; and also, to take and *state an account* between the defendants, (except *W.*, *T.* and *W.*) relative to the estate, property, and concerns of the *G. M. Company*, and as to such sums as may be due to the same defendants, respectively to each other, and to make report thereof, *to the end* that such a decree may be thereupon made as should be just.

Buel, and *Van Vechten*, for the defendants, *White*, *Taylor* and *White*, contended, 1. that the plaintiff was personally and individually bound by the contract. That this was its legal construction, and that it was so determined by the Supreme Court, in its decision on the demurrer, and by this Court, on the motion to dissolve the injunction, and by the Court of Errors, on the appeal from the order of the Court dissolving the injunction. The construction, therefore, of the contract, had become *res judicata*. (13 *Johns. Rep.* 307. 2 *Johns. Ch. Rep.* 532. 17 *Johns. Rep.* 366. *S. C. in Error. Tippets* v. *Walker*, 4 *Tyng's Mass. Rep.* 595.)

2. That the only course for this Court, was merely to give directions, as to the *damages* which the defendants, *W.*, *T.* and *W.* were entitled to, against the plaintiff, under the reference ordered by the Court of Errors.

3. That the defendants, *W.*, *T.* and *W.*, had nothing to

do with any right of contribution between the plaintiff and his associates. That was *res inter alios.*

Z. R. Shepherd, for the other defendants, except *White*, *Taylor* and *White*, contended, 1. That the plaintiff had no authority to bind the *Granville* Manufacturing Company, by the contract with *W.*, *T.* and *W.*, neither by virtue of his office, as president and director, nor as a member of the association.

2. That there was not sufficient evidence of the *assent* of the members of the association to the contract, to render them liable to *contribution.*

3. That the contract made by the plaintiff, was so imprudent and improvident in its nature, as to show a total disregard to the interests of the company, and it would, therefore, be unjust to compel them to contribute.

July 16th. The cause stood over for consideration to this day.

THE CHANCELLOR. The bill in this case had two objects: 1. To obtain a liquidation, upon equitable principles, of the demand of the defendants, *White*, *Taylor* and *White*, for damages, for the non-fulfilment of the contract of the plaintiff with them: 2. To compel the other defendants, who were members of the *Granville Cotton Manufacturing Company*, to account to and with the plaintiff, and to *contribute*, proportionably, to the payment of the damages to be assessed in favour of *White*, *Taylor* and *White*. The prayer of the bill is, that they may be decreed to pay whatever sums the plaintiff "may be obliged to lay out and expend on the contract aforesaid, or in defence of the suits at law, against him."

The defendants, *White*, *Taylor* and *White*, are entitled to a just indemnity, for the loss and injury sustained by them. The decree of the Court of Errors, in this very case, directed this Court, by a reference, or an issue, to ascertain the

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damages, if any, sustained by *White, Taylor* and *White*, by the non-execution or rescinding of the contract on the part of the present plaintiff.

The *Chief Justice*, in the opinion delivered by him in the Court of Errors, in this case, (17 *Johns. Rep.* 365.) declared, that *White, Taylor* and *White*, were entitled to be fully remunerated, for all the damages and losses they had actually sustained; and that he should consider a loss of profits as a legitimate head of damages; and, in short, that they were entitled "to a just equivalent for their labour, materials, and loss of profit." Mr. Justice *Yates*, in the opinion which he delivered in that case, (17 *Johns. Rep.* 368, 369.) only said, generally, that *White, Taylor* and *White*, were entitled to "compensation and damages," to be fairly and satisfactorily ascertained, by a reference, or by an issue. To meet the sense of the Court of Errors, as far as we may venture to infer it from those two opinions, (for the decree speaks only of the damages,) and as far as the rule of damages can be prescribed, with justice and precision, I shall direct the master, in order to ascertain and report the damages sustained, to state and report, particularly, the amount due for the work done, and materials furnished, and for all other expenses, by *White, Taylor* and *White*, actually and *bona fide* incurred, under the contract, prior to the first day of *August*, 1815, when all further execution of the contract was abandoned, by reason of the notice of the inability, or refusal, of the plaintiff to fulfil it. And I shall further direct, that he ascertain and report, in addition thereto, the amount of the actual loss and injury (if any) which these defendants sustained, by reason of such abandonment of the contract.

2. The next point, is, whether the plaintiff is entitled to *contribution* from the remaining defendants, in respect to those damages?

The decision of the Supreme Court, upon the contract now in question, was, that the plaintiff contracted with *White*,

Taylor and *White*, in his personal, or individual capacity, and was bound to answer, in his own person and estate, for the damages. This was, also, my opinion, when the cause was formerly before me, on the motion to dissolve the injunction; (2 *Johns. Ch. Rep.* 526.) and the decree of the Court of Errors assumes the same principle, when it declares, that *White*, *Taylor* and *White* were to levy, on their execution at law, the damages to be assessed in this Court. (17 *Johns. Rep.* 373.) I apprehend, then, that the defendants, *White*, *Taylor* and *White*, have no concern with this question of contribution, and that they are not to be delayed in their right to have their damages assessed and levied, until the question of contribution is settled. A similar point arose before me, in the case of *Brinkerhoff* v. *Lansing*, (4 *Johns. Ch. Rep.* 65.) and the same opinion was declared. But the point itself becomes immaterial at present, for, upon a consideration of the case, it does not appear to me, that the plaintiff is entitled to charge the other members of the association, in their individual persons, or property, nor, perhaps, even to the amount actually paid in upon their shares, for any part of the damages.

The company could not be bound, beyond the capital paid in, and the president and directors had no power, under the articles of association, to bind the members, individually. Whoever dealt with the company, as such, and without resorting to a personal covenant, was to be presumed to deal with them, according to the terms of their constitution, and to give the credit to the funds of the company, actually paid in, or to be paid in, under assessments duly made. He had no right to look to the credit of the individual members, unless these individual members entered into a personal covenant, or contract. As a check to extravagance and abuse, in the management of the company concerns, every member, under the 6th article, reserved to himself the right to withdraw himself from fur-

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ther responsibility, by refusing to pay any more assessments, under the penalty of the forfeiture of his shares, and of all previous payments made thereon. This construction is the only reasonable and just one; and it cannot be supposed, that individuals, who consented to take certain shares upon these terms, intended to place their whole fortunes at the power and disposal of the directors. There is no such power to be inferred in this case; and if such was to be the construction, it would lead to the most alarming and distressing consequences to the members of the numerous associations, of a similar nature. When a man enters into a commercial copartnership, he certainly, as Lord *Kenyon* observed, "commits his dearest rights to the discretion of every one, who forms a part of that partnership in which he engages. One partner may pledge the credit of the other to any amount." But the persons who composed the association in this case, were not partners, in a commercial sense, so as that the promise of one would bind the others personally: they were rather part owners, and tenants in common, possessing aliquot shares in the common stock, and with an authority, perhaps, vested in the directors, to control the disposition and management of it, and to bind the capital to the extent collected and paid in. Any member of the company could withdraw himself from further contribution under the assessment, by the forfeiture of his shares.

The plaintiff, by his contract of the 25th of *April*, 1815, with *White*, *Taylor* and *White*, had no right to bind the company, or even the capital stock paid in. He had no authority, even from the directors, to make this contract; it was an act entirely unauthorized. The company could not act and contract in its associate capacity; but by a resolution of the board of directors, or by means of a general agent, duly appointed by such a resolution, in pursuance of the 4th article of the constitution of the com-

pany: Nor did the assessment of the 27th of *April*, made subsequent to the date of the contract, impose any other, or further obligation on the members of the company, than to pay that assessment, or submit to the forfeiture. It was no ratification, by the company at large, of the contract in question; and though the assessment may have been made purposely to meet the first instalment under that contract, and though this fact may have been known to all the members of the company, yet they were not chargeable with any breach of faith in refusing to pay, and in submitting to the penalty. They only exercised a right reserved to them by the constitution of the company, and the contract was not their contract, nor made by any agent of theirs, duly authorised for that purpose. Neither the plaintiff, nor *White*, *Taylor* and *White*, could complain of any surprise, or imposition, by the refusal of the members to pay; for they were subscribers to the articles of the association, and knew the tenor of them. Nor did the resolution of the directors, calling for that assessment, impose any personal obligation upon the two directors, *Hitchcock* and *Raymond*, to fulfil that contract, or unite with the plaintiff in a personal responsibility. There was no personal assumption of the contract by that resolution. It only shows, that those directors were willing to meet the contract, *quasi* directors, so far as the company were willing to furnish the funds. The letter of the plaintiff, and of those directors, of the date of the 20th of *May*, 1815, to *White*, *Taylor* and *White*, contained nothing more. As far as funds had been furnished, so far, possibly, those directors, in their official capacity, were bound to comply with the contract in question, but no further.

I have already observed, that there is not the requisite evidence, that the two directors, *Raymond* and *Hitchcock*, ever authorised the making of the contract. The association was a regularly organized company, with a president and directors, treasurer, and clerk to the board; and we

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may safely ask, where is the resolution of the board, reciting and approving of the contract in question, or giving to the plaintiff general powers to make a contract, in his discretion? The absence of any such resolution, is sufficient to warrant the conclusion, that the contract was never submitted to the consideration of the board of directors, and that it never received their united deliberation and consent. The two directors, as well as the other individuals of the company, in their answer, deny, that they ever gave any such assent; and the weight of evidence is in support of the answers, and decidedly shows, that the plaintiff made the contract at his own risk, and upon his own judgment, without the authority, consent, or advice, either of the directors, or of the members at large.

There is some contrariety of testimony, respecting the assent of *W. Raymond*, jun., the director; but the assent pretended, or alluded to, by some of the witnesses, was too loose and equivocally expressed, to be of any force. It was not the assent intended by the creation of the board of directors. The directors, *quasi* directors, could not deliberate and act, but in their joint capacity. Here was no joint consultation or discussion of the board; and it would be idle, and quite repugnant to good sense and sound construction, to consider loose conversations with one individual, and then with another, in succession, when they were not assembled as a board, as amounting to any thing on the part of these persons, *as directors*, or as giving any validity to the precipitate and rash conduct of the plaintiff. To bind the directors, and through them, to bind the funds of the company, the directors must have assembled in council, and deliberated concurrently, and unitedly, and expressed their assent, by a resolution, duly announced and recorded. To reduce their assent down to mere street conversation, with them, successively, in detail, would be to subvert the meaning and utility of the institution of such a council, and destroy all the check and safety, which was in contem-

plation. And, however contradictory and uncertain the testimony may be as to *Raymond*, there is uncontradicted proof, that the other director, *Hitchcock*, expressed his dissent from the contract. So did *Hall*, *Dayton*, and *N. W. Raymond*, express their disapprobation; and several witnesses testify, that the plaintiff himself, on the day he made the contract, and immediately after it was made, was sensible of his want of authority to make it; for he observed, that "he had run the company in debt this day, to 15,000 dollars, and he did not know how they would like it."

There is, then, no well founded pretence on the part of the plaintiff, of a right to call on the company at large, or on one individual of it, to contribute to the damages which *White*, *Taylor* and *White*, may recover against him. He was no general agent of the company. There is no evidence of such character given to him. And if he was a special agent, by being president, yet a special agent, constituted for a particular purpose, and under a limited power, cannot bind his principal, beyond his authority. This is a very clear and settled rule. (*Nixon* v. *Hyserotts*, 5 *Johns. Rep.* 58. *Gibson* v. *Colt et al.* 7 *Johns. Rep.* 390. *Fenn* v. *Harrison*, 3 *Term Rep.* 757. 2 *Emerigon*, 384. 443.) But the counsel for the defendants (*White*, *Taylor* and *White* excepted) observed, at the hearing, that he was authorized to agree to a reference, and to an accounting in respect to the purchase of the land on which the manufacturing house was built, and as to the expenses incurred in building the factory; and so far a reference may be had, as between the plaintiff and the residue of the defendants. But this reference is to have no connection with the one in respect to *White*, *Taylor* and *White*, and it is to be conducted, as if the suits were distinct. Under this view, I shall grant the reference acceded to.

Decree accordingly.

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SLEE *against* BLOOM and others.

A corporation is not dissolved by an omission to elect trustees under its charter, for more than two years, while the members, constituting an integral part of the corporation, remain *in esse;* but the old trustees continue in office, until others are elected in their stead.

Though a corporation may forfeit its charter by an abuse or neglect of its franchises, yet such forfeiture must be ascertained and declared by regular process and judgment of law, before its powers can be taken away, or the corporation be considered as dissolved.

The remedy against a corporation, for a misuser or non-user of its privileges, so as to work a forfeiture, is not in equity, but at law, by *scire facias*, prosecuted at the instance and behalf of the government, not on the application of an individual.

The *Dutchess Cotton Manufacturing Company* were incorporated for twenty years, under the act of *March* 22, 1811, *sess.* 34. *ch.* 67. (1 *N. R. L.* 245.) by the seventh section of which, it is declared, "for all debts of the company, at the time of its dissolution, the persons then composing such company, shall be individually responsible, to the extent of their respective shares of stock in the company."

At a meeting of the trustees of the company, on the 18th of *August*, 1817, at which the plaintiff, (a judgment creditor of the company, and one of the trustees,) was present, it was resolved, that any of the stockholders who had paid the sums called for on their shares, then amounting to 50 per cent., should not be proceeded against for any further calls, except by way of forfeiture of the stock. By another resolution of the trustees, of the 3d of *November*, 1817, the stockholders were to have the privilege of forfeiting their stock, on paying 30 per cent. on the amount subscribed by them: *Held*, that even if the corporation were dissolved by lapse of time, the plaintiff, as a creditor, could not enforce his claim against the individuals, beyond the extent of the resolution of the trustees, to which, as one of the trustees, he had assented: and that the stockholders who complied with the terms of the resolution of the 3d of *November*, ceased to be members of the company, or owners of shares, and were, therefore, not individually responsible.

July 19*th*. THE bill, filed the 24th of *April*, 1819, stated, that the plaintiff, being possessed of a piece of land on *Wappinger's* creek, in *Poughkeepsie*, on which he had erected a cotton

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manufactory, with 912 spindles, and finding that the factory demanded greater funds than he could conveniently command, he proposed to the defendant, *George Bloom*, and others, to unite with him in a corporation, to be called "The *Dutchess* Cotton Manufactory," the stock of which was to be divided into 600 shares, of 100 dollars each. That this proposal being acceded to, the plaintiff and *G. Bloom*, *James Tallmadge jun. Cyrenus Crosby*, *George Booth*, and *Robert L. Reade*, signed and acknowledged a *certificate* of their desire to become a corporation, under that name, in the secretary's office, and became duly incorporated, on the 12th of *December*, 1814, pursuant to the act of the Legislature, passed the 22d of *March*, 1811, relative to incorporations for manufacturing purposes. (*Sess.* 24. *ch.* 67. 1 *N. R. L.* 245.) That the trustees named in the certificate of incorporation, met on the 24th of *January*, 1815, and chose their officers, to wit, the plaintiff, as president, *Crosby*, as treasurer, and *Reade*, as secretary: and it was agreed that the treasurer and secretary should confer with the plaintiff, and report the terms on which he would sell the factory, stock, and machinery, to the company. That afterwards, in *February*, 1815, at a meeting of the trustees, a report was made of the terms on which the plaintiff would sell the factory, with its stock and machinery, the amount of the terms, as reported, being 30,912 dollars; which report was accepted, and a subscription book opened, by which the subscribers promised to pay to the *Dutchess* Cotton Manufactory, one hundred dollars for every share set opposite their names. The bill set forth the names of the subscribers, and the number of shares subscribed by each. That at a meeting of the trustees, *March* 7, 1815, it was resolved, that a call of five dollars on each share should be made, payable on the 1st of *June* following. That the plaintiff, soon after, executed a deed to the company, of his factory, stock, and machinery, for the consideration of 30,900 dollars, which deed was now held by the company. That on the 1st of *May*, 1818, the plaintiff re-

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ceived scrip for 122 shares of stock, which he paid in full, by deducting the amount due to him from the company. That on the 30th of *September*, 1815, the plaintiff received scrip for 50 more shares, and paid up the same, in like manner. That at a meeting of the trustees, *September* 20, 1815, at which *Bloom*, *Crosby*, and others, were present, a further call was made for ten dollars on each share, payable on the 1st *Monday* of *November* then next, and the further sum of five dollars, on the 1st *Monday* of *December* following. That at a meeting, *January* 25, 1816, three persons were appointed a committee to inquire into the affairs of the corporation. That at a meeting of the stockholders, on the 20th of *April*, 1816, pursuant to public notice, seven trustees were elected. At a meeting, held *April* 27, 1816, it was resolved to make a further call of twenty-five dollars, on each share, payable on the 1st of *June* then next. That the stockholders generally neglected to make payment; and in *June*, 1816, it was resolved that suits should be commenced to enforce payment. At a meeting, *October* 19, 1816, it was resolved, that it was inexpedient to continue the factory in operation; and the plaintiff, who then superintended it, was directed to shut it up, discharge the workmen, and take care of the property; and a committee was appointed to examine the accounts, and settle with the plaintiff. At a meeting, in *November*, 1816, the committee appointed to liquidate the account of the plaintiff, reported a balance in his favour of 24,443 dollars and 35 cents; and it was resolved, that a proper voucher for the balance should be given to him. A bond to the plaintiff was, afterwards, executed, signed by the president, treasurer, and secretary, and sealed with the seal of the corporation, for 23,493 dollars and 35 cents; being the sum remaining due to him, after the stock subscribed by him, amounting to 17,200 dollars, paid up in full, was deducted from the sum due to him from the company. That the plaintiff having obtained a loan of the *Manhattan*

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Company, of 10,000 dollars, which he expended in advances for the company, gave his note for that sum, dated *December* 1, 1815, endorsed by *Bloom*, *Crosby*, *Booth*, and *Cocks*, payable in twelve months, and which sum went into his account, and made part of the balance found due to him. To secure his endorsers, the plaintiff gave them a bond and warrant of attorney, to confess judgment, for 20,000 dollars, on which they entered up judgment on the 7th of *June*, 1816. That when the note became due, the plaintiff was unable to pay it, and the endorsers assumed the debt, and gave their own note to the bank for the amount, endorsed by *Nathan Myers*, and which had been in part paid by moneys collected of the stockholders, and in part by the plaintiff himself. In *January*, 1817, the plaintiff, finding himself pressed by a judgment, obtained by the endorsers of his note, commenced a suit against the company, on the bond given to him, on which a judgment was confessed and perfected in *May* term, 1817, with a stay of execution until *October* term following, for the penal sum of 46,986 dollars. The bill then stated various meetings of the trustees, in the year 1817, and their proceedings. That on the 18th of *August*, 1817, at a meeting of the trustees, it was resolved, that any person might transfer his stock, and be discharged from any future calls, on paying up the calls of 50 per cent., which had then been made, and the costs; and that no proceedings should be had to enforce the payment of further calls, other than by way of forfeiture. That on the 3d of *November*, 1817, at a meeting of the trustees, it was resolved to lease the factory for three years, and that the stockholders might have the privilege of forfeiting their stock to the Company, by paying up thirty per cent. on their shares, by the 1st of *December* following, which resolution was opposed by the plaintiff. That most of the stockholders had availed themselves of this resolution, and wholly abandoned the factory, and every

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thing relating to it, though they had not given up their scrip. That no election of trustees had been made since *April*, 1817, and the stockholders had come to a resolution not to make another election, but to abandon the factory and corporation altogether. That in *October*, 1817, *Crosby*, *Bloom*, *Booth*, and *Cocks*, issued a *fieri facias* against the plaintiff, on the judgment against him, by virtue of which, the real estate of the plaintiff, worth 9,000 dollars, besides the land and property at the factory, became liable to sale. That in *November*, 1817, the plaintiff, hearing that an execution had been issued by *Bloom* and the others, on the judgment obtained by them against him, caused a *fieri facias* to be issued on the judgment in his favour. That in *January*, 1818, the attorney of the Company, pursuant to a previous resolution of the trustees, applied all the funds in his hands, amounting to 4,105 dollars and 59 cents, towards the payment of the note for 10,000 dollars, leaving a balance of 6,538 dollars and 58 cents. That to prevent a sacrifice of his property, to pay that balance, the plaintiff procured *George B. Evertson* to become security to the bank for that amount; and thereupon his note for the 10,000 dollars was given up, and his said endorsers wholly discharged. That to secure *Evertson*, the plaintiff, on the 21st of *January*, 1818, assigned to him all his real estate, and the avails of all the property of the Company, that might be sold under his execution against the Company. Under the execution on his judgment, the real estate of the Company was sold by the sheriff, in *February*, 1818, for 102 dollars, and the personal estate for 385 dollars and 50 cents, to *George B. Evertson*, as the highest bidder; and after deducting the sheriff's fees, there remained the sum of 460 dollars and 18 cents, to be applied toward the plaintiff's execution.

That no payment had been made on the judgment, unless the sum of 4,105 dollars, applied in part payment of the note for 10,000 dollars, be considered as part payment

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of it, and that if it is so considered, there will then be a balance due to the plaintiff of 18,958 dollars and 37 cents, which he has no means of obtaining, unless the stockholders are compelled to pay up their subscriptions. That there has been no meeting of the stockholders since *May*, 1817, nor have the trustees had any meeting, or transacted any business, since *December*, 1817, but have determined to abandon and give up the factory and corporation, and not to make any further call on the stockholders, nor to provide any means whatever to pay the plaintiff; that the trustees, with all the other defendants, had determined to suffer and cause the corporation to be dissolved, and had already suffered and caused the same to be dissolved, by their said transactions and omissions, in relation thereto. That the books and records of the corporation are in the power or possession of the defendants. That there is no debt due by the corporation, except that owing to the plaintiff. That he had no means of ascertaining what amount of his debt could be obtained of the corporation, except by a legal sale of their property on execution; and although it was sold at a sacrifice, yet the plaintiff was unable, owing to his embarassments, &c., to bid upon it, or to cause it to be sold for a greater sum, and the trustees and stockholders, though they had notice of the sale, neglected all attention to it; nor did they show any disposition to preserve the property, or keep the corporation in existence, &c.

The bill *prayed*, that those of the defendants, who had made any payments on their stock, might set forth the same, and that the solvent stockholders, to wit, all the defendants, (except *Crosby*,) might be severally decreed to pay to the appellant, for his benefit, such sum or balance on each and every share of stock subscribed by them, as should be sufficient, with a due proportion to be allowed by the appellant on the fifty shares purchased by him of *James Tallmadge*, jun., *Aaron Stafford*, and *Robert Stafford*,

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to pay to the plaintiff the debt due to him from the said *D. C. Manufactory*, with interest, and to indemnify him for the losses he has sustained by the unjust and oppressive conduct of the trustees and stockholders; and that it might be left with the solvent defendants, and *C. Crosby*, to arrange and adjust among themselves, any claims they may have on him, by reason of any balance that may remain due and unpaid on the stock subscribed by him; and that the plaintiff might have such other and further relief, by a decree against the defendants, in their individual capacities, or as members of the said corporation, if they pretend that the same has not been already dissolved, as the nature of his case may require.

The defendants, *Bloom*, *Crosby*, *Cocks*, *Coolidge*, *Stockholm*, *Davis*, *Nelson*, *Thompson*, *Tappen*, *M. Hoffman*, *Reynolds*, *D. Hoffman* and *Conklin*, appeared and filed their answers.

The defendant, *Bloom*, admitted most of the material facts stated in the bill. He charged, that the plaintiff induced him and the other defendants to enter into the association, for the purchase of his cotton factory, &c., by urgent solicitations, artful assurances, and exaggerated statements of the value, profits, &c.; and among other inducements, he assured the defendant, that if he would take shares, and aid in procuring the incorporation of the company, he, the plaintiff, would at any time when the defendant wished to relinquish his shares, take back the stock, and become responsible, with good security, for what moneys the defendant might advance, payable in two years, and for any further calls on the stock. That the plaintiff's object in prosecuting the suit on the bond to judgment and execution, and having the property sold, was to regain the factory and machinery, and draw from the stockholders, their subscriptions, for the payment of his debts. That *Evertson* purchased the property for the benefit of the plaintiff, who was, in fact, the real owner,

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subject only, by way of security to *Evertson*, for the sum he had assumed to pay the *Manhattan Bank*. They denied that the books and papers had been withheld from the plaintiff, but alleged that they were in his possession.

The other defendants, in their several answers, referred themselves to the answer of *Bloom*, as containing, according to their knowledge, recollection, and belief, the truth, as to the several matters stated and alleged by him; and they set up particular grounds of defence as regarded each of them separately. The defendant *Pells* put in a separate answer, admitting the material facts in the bill, except as to the amount paid on the stock purchased by him. The bill was taken *pro confesso* against the defendants, *Robert Forrest*, *Nathan Rogers*, *Nathaniel Ferris*, *George Booth*, *S. Howard*, *J. Wintringham*, *P. Ackerman*, and *C. Livingston*; but it was stipulated by the plaintiff, as to the two last named defendants, that he would not take a final decree against them, provided they would, severally, on their shares, pay a due proportion, according as others, under like circumstances with them, and who had put in their answers, might be compelled to pay. It was admitted, that *C. R. Livingston*, having paid thirty per cent. on her stock, had transferred it to the company; but that *Ackerman* had not paid any thing on his stock, nor had he transferred it.

Replications were filed to the answers put in, and proofs taken in the cause.

The cause was brought to a hearing on the 31st of *March*.

P. Ruggles, for the plaintiff, contended, 1. That the *Dutchess* Cotton Manufactory, having been duly and legally incorporated, on the 5th of *December*, 1814, under the act, all the legal consequences incident to such an incorporation, followed, of course.

2. That the defendants, having subscribed the book in which they promised to pay the Company the sum of one

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hundred dollars for every share set opposite their respective names, they became members of the corporation, interested in its property, and liable for all its debts, to the extent of the stock subscribed, by calls, during the existence of the corporation; and, by the *seventh* section of the act under which the corporation was formed, after its dissolution. (*Dutchess Cotton Manufacturing Company* v. *Davis*, 14 *Johns. Rep.* 238. and cases there cited.)

3. That the plaintiff was a judgment creditor of the Company to a large amount.

4. That the corporation had been dissolved by the acts of the defendants.

5. That the defendants have become liable to the plaintiff, in proportion to the amount of stock by them respectively subscribed, and remaining unpaid, according to the act.

6. That all the material allegations in the several answers of the defendants, were totally disproved; and the answers so far discredited by the testimony, that no part thereof ought to be considered as evidence, especially as to all the allegations of fraud on the part of the plaintiff.

7. That those stockholders who had paid 50 per cent. on their shares, were not discharged from the plaintiff's demand, by the resolution of the 18th of *August*, 1817, except *pro tanto*; nor could the plaintiff be restricted in his demand to 50 per cent. as to those who had paid only 30 per cent. as they had not paid according to the resolution, but had attempted to forfeit their shares.

8. That the plaintiff, being a creditor of the corporation, could not be bound by the resolution of the 19th of *October*, 1816, or that of *November* 3, 1817, as he did not assent to those resolutions; but on the contrary, protested against them.

9. That the pretended engagement of the plaintiff to take back the stock, at the option of the subscribers, was not proved; but if it were proved, it was without consideration,

and void; and if it were valid, it could not be binding until the subscribers had actually given all their interest in the corporation or stock, to the plaintiff.

Oakley, contra, contended, 1. That all the stockholders who had paid *fifty per cent.* on the amount of their subscription ought to be discharged from any further contribution, in virtue of the resolution of the 18th of *August*, 1817, by which it was resolved, that any stockholder might transfer his stock, on paying the amount then called for, with costs, if any, and that no further proceeding should be had against any subscriber, other than by way of forfeiture of his stock. That the plaintiff, being present at the adoption of this resolution, ought to be bound by it.

2. That the stockholders who had paid *thirty per cent.* on their subscriptions, and had transferred their stock, ought to be discharged from any further contribution, by virtue of the resolution of the board of trustees of the 19th of *October*, 1816, and of the 3d of *November*, 1817.

3. That if any stockholder should be held bound to contribute, such contribution ought not to exceed *fifty per cent.* on the amount of his subscription, by virtue of the resolution of the 18th of *August*, 1817.

4. That in case any contribution should be decreed, the stockholders ought not to be bound by the settlement made with the plaintiff, by the trustees; but the accounts ought to be opened; and a new account stated, having regard to the real value of the property transferred to the Company.

5. That in case contribution should be decreed against any of the stockholders, the plaintiff ought to account and give them credit for the actual value of the real and personal property of the Company sold to *Evertson*, under the plaintiff's judgment and execution; such sale being in trust for the plaintiff, or subject to his right of redemption.

6. That the stockholders are not *individually* liable to

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creditors, until the period for which the Company was incorporated, had expired; and the proper, and only remedy for creditors, was to compel the trustees to *enforce payment* of the subscriptions of the stockholders.

7. That if contribution should be decreed against any of the stockholders, the shares of those who were insolvent should be taken into the account as well as those of the others.

8. That if contribution should be decreed against any of the stockholders who should appear to have accounts with the Company, an account ought to be stated between such stockholder and the plaintiffs, allowing a private set-off.

9. That the plaintiff could not be considered as a creditor, in equity, as he had taken back, under his execution, the whole of the property, and received the entire amount of the earnings of the factory, together with large sums from the stockholders; and that the pretended settlement was a fraud on the stockholders not consenting to it, and was not binding on them.

10. That the factory being subject to incumbrances made by the plaintiff, a short time before he proposed the association, the subscribers, not having any knowledge of those incumbrances, ought not to be obliged to pay.

11. That the plaintiff having obtained subscriptions, through fraud and false representations, the persons subscribing were not bound to make contribution to him.

12. That the fraud of the plaintiff, in imposing the property on the Company, at an amount greatly beyond its real value and cost, contrary to his engagement, ought to bar him from any claim in equity, especially, as he has now the property itself, and has appropriated to his own use all the moneys received.

13. That the demands against the defendants being, in their nature distinct, and allowing of separate and distinct

ces, can no more be prosecuted in one suit in equity, then at law.

14. That the plaintiff, having examined some of the defendants, as witnesses, whereby he had waived any decree against them, he could not have a decree against the other defendants.

15. That the *corporation* ought to have been made a party to the suit; and on this bill, there can be no decree made, unless against the defendants individually.

July 19. The cause stood over for consideration until this day.

THE CHANCELLOR. This is a suit against the individual stockholders of the "*Dutchess Cotton Manufactory*," a company incorporated in *December*, 1814, by filing a certificate in pursuance of the act of the 22d of *March*, 1811, entitled, "An act relative to incorporations for manufacturing purposes." Every association incorporated under this act, was declared to be, for "the term of twenty years next after filing their certificate, a body politic and corporate." The bill seeks to charge the defendants personally, for a judgment debt of the incorporated company, on the ground that the corporation is dissolved, and that the members are individually responsible for the corporate debts, to the extent of their shares of stock. The 7th section of the statute declares, that for all debts which shall be due and owing by the company *at the time of its dissolution*, the persons then composing such company shall be individually responsible, to the extent of their respective shares of stock in the said company, and no further."

1. The first and leading question in the case is, whether the corporation is dissolved, so as to enable the plaintiff to call upon the individual members. It will not be disputed that without such a provision in the statute, the individuals would not be responsible in their private property, either before or after the dissolution of the company, for

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corporate debts. The facts from which an actual dissolution is inferred, are, that the stockholders have not elected trustees since *April*, 1817, and that the trustees have not met, as a body, since the 31st of *December*, 1817, and that all the corporate property, real and personal, was sold on an execution issued in the name, and at the instance of the plaintiff, on the 1st of *February*, 1818, and that the members have since abandoned all attention to the institution.

The bill was filed on the 24th of *April*, 1819, and it appears to me that I am not authorized, from any of the facts in the case, to consider the corporation as dissolved, at the commencement of this suit.

A corporation is not dissolved by omitting to elect trustees, under its charter, if an integral part remains: The trustees continue in office, until others are elected in their stead.

The omission to elect new trustees, in 1818, and 1819, did not, of itself, work a dissolution, according to the opinion of the Supreme Court, in the case of the *People* v. *Runkle*; (9 *Johns. Rep.* 147.) and by the authority of the cases there referred to, a corporate election after the year, would be good, upon general principles of law, if an integral part of the corporation remained; and the officers already in, would continue to be good officers after the year, and until others were elected. In this case, we have the express authority of the statute under which the corporation was created, "that in case it should at any time happen that an election of trustees be not made on the day when, by the by-laws of said company, it ought to be done, the said company, for that cause, shall not be dissolved, but it shall and may be lawful on any other day to hold an election for trustees, in such manner as shall be directed by the by-laws of such company."

The members of the corporation, who are the integral part of it, are in *esse*, and I see no difficulty in a future meeting of the last elected trustees, and in a new election of trustees to be ordered and prescribed. In *Regina* v. *Ballivos* (1 *P. Wms.* 207.) vacancies of the capital burgesses were to be filled up in fifteen days, and they had neglected to fill up vacancies for 22 years, until all were extinct to one man. In so extravagant a case,

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Lord Chief Justice *Parker* did not think it reasonable he should have the power of electing all the rest; but *Powel*, J., observed, that a corporation might, upon their charter day, choose a bailiff, though there was none then in being, nor had been for 20 years before. Would these Judges have hesitated, in a case like this, when there was no precise charter day mentioned in the law, to allow a new election of trustees by the the stockholders, though two years had intervened, and when the old trustees could lawfully hold over? It seems to be too plain a proposition to be disputed.

A corporation aggregate may be dissolved within the period prescribed by its charter, in certain modes, and upon certain events, none of which have occurred in this case. It may be dissolved, if it becomes *incapable* of continuing its corporate succession, or executing its corporate functions; as by the death of all its members, or the destruction of an integral part of it, or it may be dissolved by surrender of its franchises into the hands of the government, or by forfeiture of its charter through abuse or neglect of its franchises. The last is the alleged ground of forfeiture in this case; but I apprehend, that the forfeiture in such case must be judicially ascertained and declared, and that the power, which may have been abused or abandoned, cannot be taken away but by regular process. The judgment in such cases is, that the partiesbe ousted, or that the liberty be seized into the hands of the government. (*Rex* v. *Stevenson*, *Yelv.* 190.) This subject underwent great and learned discussion in the case of the *King* v. *Amery*, in the *K. B.* (2 *Term Rep.* 515.) and it was decided by that court, as the result of the investigation, that a corporation may be dissolved, and its franchises lost, by non-user or neglect; but it was assumed, as an undeniable proposition, that the default was to be judicially determined in a suit instituted for the purpose. If the parties, observed *Ashhurst*, J. in delivering the opinion of the Court,

A corporation aggregate may be dissolved, within the period prescribed by its charter, by the death of all its members, or the destruction of an integral part of it, or by a surrender of its franchises into the hands of the government, or by a forfeiture for non-user or mis user of its franchises. But in the latter case the forfeiture must be judicially ascertained and declared.

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being called upon in a Court of justice, to state their right to the franchise, neglect or refuse to do it, or if the corporation surcease their time, they shall lose their franchise, and the judgment shall be, that the franchise be seized. One great point in that case was, whether a corporation could be dissolved at all; and the opinion of the ten judges in the house of Lords, in 1689, was relied on to show that it could not be dissolved. But Lord *Holt* was of opinion that a corporation could be dissolved for a breach of trust; and that seemed to be the opinion of the *K. B.* in Sir *James Smith's* case, cited, also, as the case of the *King* v. *the Mayor of London*, (4 *Mod.* 33. *Shower*, 274.) and it is no doubt the settled doctrine at this day. But that a corporation is to be adjudged dissolved for non-user or mis-user of its franchises, until it has been called upon to answer for the breach of trust, is no where assumed. The contrary doctrine is universally taught, and it is founded on very obvious principles of justice. In the case of *Rex* v. *Passmore*, (3 *Term Rep.* 199.) it was held that when the integral part of a corporation is gone, and the corporation had no power of restoring it, or of doing any corporate act, it was so far dissolved that the Crown might act and grant a new charter. It was only for the crown to interfere, without a forfeiture judicially declared, and that too in in a case where the corporation was reduced to such a state as to be incapable of acting or of continuing itself: the crown might then grant a new charter, said Mr. Justice *Buller*, without "weighing very nicely whether the corporation could be said to be actually dissolved or only in danger of being so." Lord *Kenyon* spoke in that case, with great caution, and with the admission of due limitations. He agreed to the validity of the new charter, but said, that as to particular purposes, which do not relate to the powers of government, but to personal privileges, the corporation is not dissolved until the crown interposes. A *scire facias* was proper when there was a legal existing body capable of

A corporation may be dissolved for a breach of trust; but not until it has been called upon to answer.

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acting, but who have been guilty of abuse of power, because when a delinquency was imputed, they ought not to be condemned unheard.

Assuming the charges in the bill in this case to be true, Lord *Kenyon* points out the proper remedy: It is by the judicial process of *scire facias;* and I believe there is no instance of calling in question the rights of a corporation, as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government. In the case of *The Commonwealth* v. *Union Insurance Company*, (*5 Tyng*, 230.) there was an application for leave to file an information, in the nature of a *quo warranto*, against the corporation, at the relation of an individual, on the charge that the corporation had been guilty of malfeasance, in not requiring from the members, payment of fifty per cent. on their subscription stock, within the time limited by the statute of incorporation, and which charge implied a gross mis-user of the powers of the corporation, and one that would incur a forfeiture of the charter.

The proper remedy against a corporation for non-user or mis-user of its franchises, is by *scire facias*, prosecuted at the instance and in behalf of the government.

Chief Justice *Parsons*, in delivering the opinion of the Court, observed, that the corporation might forfeit its franchises by nonfeasance or malfeasance; but the information for the purpose, must be presented under the authority of the State, which must be a party to the suit, and a party to the judgment, for the seizure of the franchises. This is the more indispensable, as the State may waive the breach of any implied or express condition contained in the charter. The remedy for the non-user or mis-user of the privileges of the charter, so as to work a forfeiture, is at law, and not in this Court; and so it was undertood in the examination of the case of the *Attorney General* v. *The Utica Insurance Company*, (*2 Johns. Ch. Rep.* 389.)

I conclude, therefore, that the corporation is still subsisting, in judgment of law, and that this Court is not authorized, from any thing that appears in the case, to consider

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the corporation dissolved. It follows, then, that the bill against individual members for a corporate debt, cannot be sustained.

2. Nor do I think that the plaintiff's claim could be supported, to the extent of the shares of stock owned by the individual members, even if the corporation were now dissolved, by the lapse of time. I do not allude to the fraudulent suggestions that have been made against the validity of the debt, for I am willing to suppose that these suggestions have been met and repelled; but I refer to certain resolutions of the board of trustees, of which the plaintiff was a member, passed when he was present, and which ought, in equity, *to bar him, at least as a creditor*, from carrying his claims against the individual members beyond the provisions of those resolutions. Those resolutions were a compact between the representative and the constituent, between the trustees and the stockholders, and the plaintiff, as a party thereto, is bound, in good faith, to observe them.

The first resolution referred to, was passed on the 18th of *August*, 1817. The plaintiff, at that time, was a judgment creditor of the corporation, and his judgment was the result of a suit he had, in *January* preceding, commenced against the company. The resolution directed, that the treasurer should provide a book for the transfer of stock, and that any person might transfer upon the book of the company, the sum called for, and the arrears, first been paid in full, with the costs of suit, if any; "and that there should be no further demands made by prosecution against any subscriber upon his subscription, nor any proceedings be had against any subscriber other than by way of forfeiture of his said stock, in case of his non-payment of any further calls." The plaintiff was present, as a trustee, and concurred in this resolution; and at this time, the amount of the previous calls upon the stockholders, amounted to 50 dollars on a share. Here was an express stipulation, that

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the only remedy against any stockholder for non-payment of future calls, should be by forfeiture of his stock, and not by prosecution. The statute under which the company was incorporated, and which may be considered as their charter, gave to the trustees power "to make such by-laws, rules, and regulations, as they should deem proper, respecting the management *and disposition of the stock*, property, and estate of the company; and also to call and demand from the stockholders, respectively, all such sums of money by them subscribed, at such time, and in such proportions, as they should deem proper, *under pain of forfeiting the shares of the said stockholders, and all previous payments made by them*," &c. The stipulation in and by the resolution was, that the corporation would not prosecute, but proceed by way of forfeiture; but it may be said, *that creditors* were not within the words or meaning of the resolution, and that it would not impair their right to hold individuals responsible, upon the dissolution of the company, under the 7th section of the statute. This may be true, as to creditors in general; but I think a Court of Equity would never assist a creditor to carry his claim upon individuals, beyond the extent of that resolution, when that creditor was, at the time, present, as a trustee, and a party to the resolution.

It was a declaration to the stockholders that they could, and might rid themselves of all further responsibility, by the forfeiture of their shares. There was no exception or restriction as to existing debts; and it is very clear that none was intended or implied at the time. The stockholders had a right to repose upon the faith of that promise, and to make their arrangements accordingly. Many of them would probably dismiss all further concern about the institution. The plaintiff no doubt deemed his judgment debt sufficiently secure under the operation of that resolution; and he, in his capacity of trustee, announced to the company how far he was willing to limit his existing demand, in his

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character of creditor. He cannot, therefore, in justice, nor in good faith, enforce his debt, in the face of that resolution, against the individual members, to the whole extent of their stock. He cannot be permitted in this case to discriminate between his rights as a creditor, and his acts as a trustee. There would be a mistaken casuistry in the distinction; and one which a Court of equity could not recognise: It would have the colour and effect of imposition and fraud.

The next resolution of the board of the trustees, still further limiting the demand of the corporation upon the stockholders, was passed the 3d of *November*, 1817. It was resolved, "that the stockholders of the company have the privilege of forfeiting their stock to the company, by paying 30 per cent. on the subscription list, together with the costs of suit, (if any) on or before the 1st of *December* following: and it was further resolved that the secretary of the company give notice in the papers of the village."

There is no pretence, that this resolution was passed with fraudulent views, or that the stockholders took undue means to procure it. It was an expression of the judgment and will of the trustees, declared in good faith, and upon a view and consideration of the existing circumstances of the company; and the stockholders who availed themselves of this resolution, were completely discharged; they were no longer "persons composing the company, and owners of" shares of stock, within the provision of the statute declaring such persons individually responsible, at the dissolution of the company. It would be impossible to consider the individuals who forfeited their shares upon the terms of this resolution, as any longer members of the company or owners of shares. The trustees have power, by the statute, to annex the penalty of forfeiture of shares, to the non-payment of the calls; and after forfeiture of a share, the former owner loses it, and is no longer a member, and cannot be responsible as a member. Every member whose shares were forfeited under that resolution, is wholly discharged from any responsibility for the plaintiff's debt; and

this consequence must follow, unless it could be shown, that the resolution was the result of a fraudulent combination between the trustees and the stockholders, to defraud the plaintiff. There is no colour in this case for this conclusion; and it would, therefore, appear to me, that among the twenty-two defendants in this case, there are thirteen who have a good defence under this resolution, and there are two who have a good defence under the resolution of the 18th of *August*, 1817, and one more who has paid up his shares in full; there are not more than six of the defendants who have not paid 30 per cent. on their shares.

The plaintiff was a trustee, and present when this resolution of the 3d of *November* was passed; but he protested against it, as it would not pay the debts of the factory. I apprehend, however, that the benefit of this protest, as it respected his claim against the stockholders, was waived by his subsequent conduct. The resolution was directed to be published in the *Poughkeepsie* papers, where the plaintiff resided, and it was published for three weeks, in *November*, 1817, and no notice of his dissent was mentioned in the advertisement containing a certified copy of the resolution. The stockholders had a right to presume that the resolution was with the assent of the plaintiff, and the plaintiff suffered that presumption to be drawn, without taking any public step to prevent it.

Again; by the resolution of the board, of the 1st of *December*, 1817, at which the plaintiff was present, and concurring, it was resolved, that the attorney of the company apply the funds he had in hand, belonging to the Company, to the credit of a note drawn by *Booth, Bloom, Crosby* and *Cocks*, at the *Manhattan Bank*. The resolution was passed on the day that the moneys, under the operation of the resolution of the 3d of *November*, were to have been paid in; and it was passed with a view to these very funds, which amounted to about 2,200 dollars. The note to which they

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were to be applied, with the knowledge and assent of the plaintiff, was one given for and on account of a debt due from the plaintiff; and he observed to one of the witnesses, that a payment on that note was as good to him as a payment by the members on their stock. This was an instance where the plaintiff availed himself, as a trustee, of the application, for his particular benefit, of moneys paid in by the stockholders, on the faith of the resolution of the 3d of *November*, and with a view and expectation of being discharged from all further payments by the forfeiture of their shares. This was a strong ratification, on his part, of the resolution, from which he had originally dissented. He availed himself of the fruits of it; and when these fruits were the result of a confidence reposed in its validity, how could he now be permitted, by the aid of this Court, to disregard that confidence and sanction, and look beyond the resolution for further payment? Good faith would seem to require, that he should, at the time, either have acquiesced in the resolution, or should have made his dissent as public as the resolution, and have abstained from all particular and pointed participation in its results. Again; on the 26th of *December*, 1817, he was present, as a trustee, and concurred in a resolution, "that the attorney of the Company be directed to commence suits against all the persons who were subscribers to the stock of the Company, *who did not comply with the resolution of the 4th of November*, 1817." This resolution is expressly stated in the minutes of the board to have been passed unanimously; it would appear that the plaintiff was absolutely and expressly committed by this resolution, and that he is now to be deemed bound, as a party, by these acts of recognition, to the resolution of the 3d of *November*. He would, therefore, even upon the assumption of his right to look to the individuals of the Company for his corporate debt, be bound to confine his claim to those who had not complied with either of the resolutions of the 18th of *August*, or 3d of *November*, 1817;

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and as to those, he could not, under the resolution of the 18th of *August*, look further than to the payment of 50 per cent. or the arrearages of the prior calls, and to the forfeiture of their shares for the residue. The plaintiff presents no very favourable claim to the equitable interposition of this Court, even to any extent. He commenced the manufacturing establishment in question on his own account, and with his own funds, and, afterwards, solicited and procured the formation of the Company to assist him, and then sold his private interest in the establishment to the Company for 30,900 dollars, on the 1st of *May*, 1815. He then had a balance liquidated and admitted in his favour, in *November*, 1816, to 23,493 dollars, and in *January*, 1817, prosecuted the Company, and in *May*, 1817, obtained judgment against them; and, on the 1st of *February*, 1818, sold on execution, the whole real and personal estate of the Company, for 460 dollars. The property which he sold, and caused to be purchased in for this almost nominal sum, he had, three years before, sold to the Company for the large consideration which has been mentioned; and the extent to which he now pushes his claim, is for the balance of 18,958 dollars left unsatisfied, after he had swept away all the stock of the Company, and virtually annihilated its credit and capital.

I shall, accordingly, declare, that the plaintiff is not entitled to sue the members of the Company, in their individual capacity, for a corporate debt, inasmuch as the corporation is not, in judgment of law, dissolved; nor can it be dissolved for any non-user or mis-user of its franchises, without due process of law; and I shall further declare, that by the resolutions of the 18th of *August*, and of 3d of *November*, 1817, (to one of which the plaintiff was a party at the time, and to the other he has given his subsequent assent and ratification,) the plaintiff would not be entitled to any claim against those defendants who have paid in 30 dollars, upon each of their shares, nor to any claim beyond 50 per cent.

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or the arrearages of former calls, and the forfeiture of their shares, as to those defendants who have not paid in 30 per cent. even if the corporation was now dissolved.

The bill must be dismissed with costs, as to those defendants who have appeared and answered; and without costs, as to those defendants who have not appeared and answered.

Decree accordingly.

VAN HORNE and others *against* D. FONDA.

Where a person, named as executor in a will, but who never qualified as such, took possession and disposed of part of the personal estate of the testator, and paid some of his debts: *Held*, that these acts were proof of his election to act as executor, and that he was chargeable as executor.

An executor or trustee cannot buy in mortgages, judgments, or other debts of the testator, for his own benefit, nor can he, in any way, deal or traffick with the estate, for his own emolument.

Admitting that one tenant in common may, in a particular case, purchase in an outstanding title, for his own benefit; yet where two devisees are in possession of land, under an imperfect title, devised to them by their common ancestor, one of them cannot buy up an outstanding, or an adverse title, to disseise or expel his co-tenant, but such purchase will enure to their common benefit, subject to an equal contribution to the expense.

April 12—16, *and July* 27*th.*

THE bill filed *July* 28, 1818, by *Abraham A. Van Horne* and [redacted]e his wife, and *Jellis H. Fonda*, stated, that the plaintiffs, *Jane* and *Jellis*, were the only children and heirs at law of *Henry V. Fonda*, late of *Caughnawaga*, in *Montgomery* county, deceased. That *Jellis Fonda*, father of *H. V. F.*, on the 23d of *May*, 1791, made his will, by which, after sundry legacies and bequests, he devised all the residue of his estate to his two sons, *Henry* and *Douw*, the de-

fendant; and he nominated his son *Douw*, his son-in-law *John Yates*, his brother *A. Fonda*, and his friends *H. Fry* and *A. Van Vechten*, his executors. The testator died the 23d of *June*, 1791, seised, &c. of real and personal estate. The defendant, *John Yates*, and *A. Fonda*, proved the will, and qualified as executors, before the surrogate of *M.*, the other two persons named having declined; but the defendant was the sole acting executor, and took possession of all the real and personal estate of the testator, *J. F.*, not specifically devised; but he never filed any inventory of the personal estate. *Henry V. Fonda* having made his will, died the 23d of *April*, 1799, leaving the plaintiffs, *Jane* and *Jellis*, his only children and heirs at law, and a widow. The plaintiff, *Jane*, was born the 6th of *November*, 1792, and married the plaintiff, *Van Horne*, the 16th of *December*, 1810; the plaintiff, *Jellis Y. F.*, was born the 12th of *March*, 1795. *Henry V. F.*, by his will, devised his farm, &c. at *C.* to his wife, to hold the same until his son *Jellis* should arrive at the age of twenty-five years; and devised the one moiety of the same to the plaintiff *Jane*, and the other moiety to the plaintiff *Jellis*; but his wife to hold, during her natural life, the moiety devised to his daughter *Jane*. He empowered his executors, or the major part of them, to sell and convey his real estate, or such part thereof as might be necessary, for the payment of his debts; and he made his two children, *Jane* and *Jellis*, his residuary devisees. He declared the bequest to his wife to be in lieu of dower; and appointed his brother *Douw*, the defendant, his uncle, *John F.*, and *Evert Yates*, and *James Lansing*, his executors. The bill further stated, that, soon after the death of *Henry V. F.*, the executors named in his will, met for the purpose of determining whether they would undertake the executorship; on which occasion, the defendant exhibited a statement of the debts owing by *H. V. F.*, amounting to 1,528*l.* 8*s.*, and of debts due to him, amounting to 222*l.* 15*s.*, which he represented as correct. That at this meeting, the defendant proposed that a part of the old

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Caughnawaga farm should be sold, for the payment of the debts of *Henry V. F.*; to which *John F.* objected, and stated, that the estate of *Henry V. F.* was entitled to one half of the moneys which the defendant had received, or was to receive, from the estate, as a compensation for lands in the *Royal Grant*, which *Jellis F.*, deceased, had purchased from the *Indian* children of Sir *William Johnson*. That the defendant answered, that *Jellis Fonda's* title was deficient; and that he, the defendant, had been to *Upper Canada* to get a conveyance, and intimated that he should not pay over any of the moneys to the estate of *Henry V. F.* That *John F.* was so incensed at the conduct of the defendant that he refused to prove or act under the will of *Henry V. F.*; and the meeting was accordingly broken up, and neither he, nor *James Lansing*, nor *Evert Yates*, took upon themselves the execution of the will.

That *Jellis F.* purchased 2,000 acres of land, in the *Royal Grant*, of *Brant Johnson*, (a natural son of Sir *William Johnson*,) and who executed a deed in fee for the land, dated *July* 8, 1789. That on the 28th of *December*, 1790, *Jellis F.* and his wife conveyed the same land to *Abraham G. Lansing*, and his heirs, &c. in trust, for *Jellis F.*, his heirs and assigns forever. That *A. G. Lansing*, on the 15th of *August*, 1791, conveyed certain lots, parcel of the 2,000 acres, to *John Lansing, jun.* on the same trust, for the benefit of *Jellis F.*, &c. That *John L., jun.* and his wife, and *Abraham G. L.* and his wife, on the 19th of *December*, 1793, released the whole 2,000 acres to *Henry V. F.* and *Douw F.*, as tenants in common, and entitled thereto, under the will of their father *Jellis F.* That, it being supposed that the land had been forfeited to the State, by the attainder of Sir *John Johnson*, the only son and heir at law of Sir *W. J.*, or by the attainder of *William J.* and *Brant J.*, the devisees thereof, and been sold by the commissioners of forfeitures; for the purpose of avoiding controversy, and with a view to facilitate an application to the Legislature,

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by vesting the legal title in the defendant solely, and giving him a discretionary power as to the terms of compromise with the State, it was agreed between *H. V. F.* and the defendant *D. F.*, that *H.* should convey to the latter all his interest in the 2,000 acres; which was accordingly done, by a deed from *H.* and his wife, dated *May* 3, 1794. That the commissioners, on behalf of the State, agreed with the defendant, to pay him, in extinguishment of their claim, three dollars and twenty-five cents an acre; and the defendant and his wife, accordingly, on the 20th of *March*, 1799, released the 2,000 acres to the State, and the defendant, afterwards, received the sum of six thousand five hundred dollars from the State, to the one half of which sum, *H. V. F.* was, and his legal representatives, since his death, were justly entitled. That *H. V. F.* and his wife, on the 13th of *May*, 1794, executed a mortgage of the rents and reversions of certain lots in the *Royal Grant*, being part of the residue of the real estate of *Jellis F.*, devised to *Henry V. F.* and *D. F.*, and assigned to *H. V.* in severalty, for securing the payment of 250 dollars and the interest. That in *February*, 1800, the defendant procured an assignment of the mortgage to him from *J. Y.*, and proceeded to sell the premises, under colour of a power contained in the mortgage, and purchased them himself; and has, thereby, possessed himself of the rents. That the pretended power was void, as *Henry V.* was, at the time of its execution, under the age of 25 years. That the defendant obtained an assignment of a judgment of *Adam Snell* against *Henry V. F.*, under which, in 1814, he sold 100 acres of the land. That the payments made on the mortgage, and the rents received, or which might have been received by the defendant, far exceeded the principal and interest due on the mortgage. That in *March*, 1803, *Worden Hammond* married the widow of *Henry V. F.*, and died the 29th of *July*, 1813. That *Myndert B. Wimple* recovered a judgment in 1806 or 1807, against *Hammond* and his wife, the plaintiffs, *Jane* and *Jellis H. F.* as heirs and devi-

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sees of *Henry V. F.* on his bond for 50 pounds, dated *July* 10th, 1792. That *Peter Putman* also recovered a judgment against the same persons, as heirs and devisees of *Henry V. F.*, in 1806 or 1807, on his bond for 55 pounds, dated *September* 19th, 1796. That execution, on these judgments, were issued in 1807, under which the *Caughnawaga* farm, or land devised by *Jelli's H. F.* deceased, to *H. V. F.*, amounting to above 339 acres, was sold by the sheriff, and the defendant became the purchaser. That the defendant, at the time of sale, declared publicly, that he intended to purchase the land for the benefit of his brother's infant children, the plaintiffs *Jane* and *Jellis H.*; in consequence of which declaration there was no competition, and the land was struck off, in a few minutes, to the defendant, for a nominal price. That the defendant since, and now pretends that he fairly purchased the lands at the sheriff's sale for his own benefit, and paid the sheriff 586 dollars and 75 cents for the same; and falsely and fraudulently sets up a mortgage in fee of the farm, by *Henry V.* dated 10th of *January*, 1799, to *John Jacob Beekman*, his father-in-law, and to the defendant, for securing the payment of 157 pounds, according to the condition of a bond to *J. J. B.* and 380 pounds to the defendant, with interest, from the date of the mortgage. That the defendant had the entire control of the executions and sales; and never paid any part of the money bid by him for the lands to the sheriff. That the farm so sold was under high improvement and cultivation, and of great value; and that two acres of the land would, at a fair sale, have sold for enough to have satisfied the executions and costs. That the mortgage to *J. J. B.* and the defendant, was taken when *Henry V.* was very ill; and that the sum of 380 pounds, was included in the mortgage, under a promise of the defendant that he would advance the money to meet the wants of *Henry V.*; but that none of it was paid. That the defendant obtained from the widow of *Henry V.* a release of her dower in the farm, and in lieu thereof, assigned to her a part of the land for life,

and afterwards procured from her a release of the part so assigned to her. That in 1816, the defendant attempted to extort from the plaintiff, *A. Van Horne*, a recognition of the defendant's right to the farm; but having failed to obtain it, he brought an action of ejectment against *A. V. H.* and turned him out of possession. That the widow of *Jellis F.* continued in possession of the farm with the consent of the defendant, from the death of her husband until she died, in *February*, 1804, when the defendant possessed himself of the stock, &c. on the farm.

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The bill *prayed* for a discovery and an account of the real and personal estate of *Jellis F.*, not specifically devised, a moiety of which belonged to *Henry V. F.*, and of the rents, profits, proceeds, &c. and for general relief.

The defendant, in his answer, gave schedules of the real and personal estate of *Jellis F.*, and of the personal estate of the widow. He stated that *Henry V. F.* lived with his mother, on the *C.* farm, until his death. He admitted, that he was the active executor of *Jellis F.*, and the receipt of the rents and profits of the real estate, and of the personal estate, as stated in the schedules. That he made no inventory of the personal estate; but he made a statement of the debts and credits, as set forth in schedules. That he received a letter, on the 16th of *March*, 1799, from *Henry V. F.*, a short time before his death; and that he promised *Henry V. F.* to take care of his children. That he made the statement to his co-executors of the debts of *Henry V. F.*, as mentioned in the bill, and that he had paid the debts marked "settled," out of his own moneys, and taken an assignment of the securities for them; and that the debts were marked "settled," in the statement, after the same were paid and assigned to him, and after the statement had been exhibited at the meeting of the executors. He denied that he acted as executor of *Henry V. F.*, or that he received and paid debts as his executor. He admitted that Sir *William Johnson* died seized of the 2,000 acres in the *Royal Grant*, and that he

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devised 1,000 acres thereof, to his son *Brant*, and 1,000 acres to his son *William*; but he denied that *William* ever sold and conveyed his 1,000 acres to *Brant*. He admitted the conveyance of the 2,000 by *Brant J.* to *Henry V. F.* and that the conveyance was delivered up to the State commissioners, on the 17th of *March*, 1799. He admitted that *Jellis F.*, on the 28th of *December*, 1790, sold and conveyed the 2,000 acres of land to *Abraham G. Lansing*, for the consideration of one hundred pounds, in fee, with warranty; but he denied that it was upon any trust whatever, express or implied, for the benefit of *Jellis F.* That *Abraham G. Lansing* sold and conveyed the lots mentioned in the bill, to *John Lansing*, jun., but not upon any trust whatever. That *Abraham G. L.* and *John. L.*, jun., soon afterwards, discovered that *Brant J.* had no right or title to the 1,000 acres devised to *William J.*, and they threatened to prosecute the executors of *Jellis H. F.* on the covenant in his deed. That the defendant and *Henry V. F.*, being advised that the title of *Brant J.* to the 1,000 acres, was not valid, on the 19th of *December*, 1793, conveyed to *Abraham G. L.* and *John L.*, 2,250 acres in *Fonda's Patent*, and 400 acres in the third allotment of the *Royal Grant*, in lieu thereof. And on the 19th of *December*, 1793, *Abraham G. L.* and *John L.* conveyed back to the defendant and *Henry V. F.* the 2,000 acres. That on the 3d of *May*, 1794, *Henry V. F.* conveyed his right to the 1,000 acres, devised to *Brant J.*, to the defendant, for one hundred pounds, which was a valuable consideration, truly paid; and he denied that the conveyance was for the purpose, or on the terms set forth in the bill. That on the 29th of *May*, 1795, he purchased of *Moses Johnson*, son and heir at law of *William Johnson*, the devisee of Sir *William J.*, his right and title to 1,000 acres, for the consideration of 600 dollars. That the defendant, afterwards, released his right to the 2,000 acres, to the People of the State, for 6,250 dollars; but he denied that *Henry V. F.* was, in any way, concerned in this compromise with the

Commissioners, or that he was entitled to any part of the money received.

He denied all fraud or unfairness in the purchase of *Henry V. F.*, but averred that the same was for a valuable consideration; and that on the 24th of *April*, 1794, he conveyed to *Henry V. F.*, 1,000 acres of land in the Royal Grant, in satisfaction of all his right and interest to the said 1,000 acres of *Brant J.*, pursuant to an agreement between them.

He admitted the mortgage of *Henry V. F.*, of the 13th of *May*, 1794, to *Joseph Yates*, of part of the estate devised to him and *Henry V.*, as tenants in common; but he averred that he had released his right, &c. in the premises to *Henry V. F.*, in consideration of the release by him of his right in the 1,000 acres. He admitted that he and *Henry V. F.*, in 1793, leased lots to five different persons, whom he named, and that *H. V. F.* afterwards released the reversion of one of the lots, to the lessee, *Flint*. That *Jellis H. F.*, the 7th of *October*, 1788, executed four leases of 100 acres each, in lot No. 17. included in the mortgage to *J. Yates*. That the defendant, on the 4th of *February*, 1800, purchased *Yates'* mortgage, for 875 dollars and 35 cents, and sold the mortgaged premises, by virtue of the power contained in the mortgage, the 20th of *August*, 1800, for 400 dollars; and became himself the purchaser. That the sale and purchase were fair and *bona fide*. He admitted, that at the time that *Henry V. F.* executed the mortgage, he was under twenty-five years of age, but that the defendant was ignorant of the fact, until some time in 1804. That *Henry V. F.*, on the 25th of *July*, 1799, gave a sealed bill to *Adam Snell*, for the penal sum of 820 dollars, to secure the payment of 410 dollars, with a warrant of attorney, by virtue of which, a judgment was entered on the bill, in the Supreme Court, the 20th of *May*, 1799. That on the 4th of *September*, 1800, he purchased and took an assignment of the judgment from *Snell*, for 445 dollars and 52 cents, being the principal, interest, and costs, then due, which he paid. That he caused

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the judgment to be revived in 1814, against the plaintiffs, as devisees of *Henry V. F.* That on the 17th of *May*, 1810, he sold and conveyed the reversion of 100 acres of land, comprised in the mortgage to *Yates*, for 214 dollars and 28 cents; that on the 23d of *May*, 1811, he gratuitously conveyed the reversion of 300 acres in the same lot, No. 17, to the widow of *Henry V. F.*, for life. That in *March*, 1814, lot No. 2. in the *Royal Grant*, belonging to *Henry V.*, was seized and sold under an execution, issued on the judgment of *Snell*, and was struck off, at the sheriff's sale, to the defendant, as the highest bidder, for 850 dollars and 97 cents. That he sold the lot, on the same day, for 800 dollars. That the schedule *G.* annexed to his answer contained a true account of the sums received by him from the sales of parts of the premises, and of the rents in arrear, &c. That *M. B. Wimple*, about the 7th of *August*, 1807, recovered a judgment against the plaintiffs, *Jane* and *Jellis H. F.*, as heirs and devisees of *Henry V. F.*, for 321 dollars and 36 cents. That *Peter Putnam* also recovered a judgment against the same plaintiffs, as heirs and devisees of *H. V. F.*, on the 3d of *August*, 1807, for 265 dollars and 48 cents. That executions were issued on those judgments in 1807, by virtue of which the sheriff seized the *Caughnawaga* farm, (except the fifty acres sold to *Yates*,) containing 272 acres and an half; and sold the same on the 28th of *October*, 1807, to the defendant, as the highest bidder, for 520 dollars, subject to all antecedent incumbrances. That the farm was then subject to the mortgage to *J. J. Beekman*, and the defendant, for 1,347 dollars, and to a judgment in favour of *John Davis*, for 250 dollars, and to the balance due on a judgment in favour of *Stevenson* and *Dowe*, of 135 dollars and 32 cents. That there was due on these three incumbrances, at the time the farm was sold, exclusive of the two executions, 2,937 dollars and 66 cents. The defendant alleged, that the purchase of the farm by him, at the sheriff's sale, was fair and *bona fide*, and that he had no interest in the

judgments. That he actually paid the amount of the purchase money to the sheriff, and to *Wemple* and *Putnam*, the balance of the executions. That at the time of the sale, there were other debts of *Henry V. F.*, assigned to him, and a promissory note of *H. V. F.*, for 100 dollars, for money lent to him. That his object in purchasing the farm was to secure the amount of his three *liens*, and of the debts mentioned in a schedule annexed to his answer. That the farm, at the time of the sheriff's sale, was not worth more than 8,000 dollars; and that he has made improvements since, to the amount of 2,500 dollars. He denied all the charges of fraud or improper conduct in this transaction. He stated, that his part of the mortgage debt of *Beekman's* consisted in notes of *H. V. F.* to the amount of 380 pounds, to secure which and the debt of *B.*, the mortgage was given, and the notes then delivered up to *Henry V. F.* He admitted the agreement with the widow of *Henry V. F.* relative to the dower; and stated, that she mortgaged the lands assigned to her for her dower to *A. Van Vechten*, to secure 706 dollars and 14 cents, of which sum 556 dollars and 80 cents, belonged to the defendant, being money lent to her second husband *W. H.*: that the defendant, on the 17th of *September*, 1810, paid the sum due *Van Vechten* and took an assignment of the mortgage; and in *October*, 1810, *W. H.* and his wife released her right in the mortgaged premises to the defendant, in payment of the mortgage; and thus he acquired a legal and *bona fide* title to the *Caughnawaga* farm; and he denied all manner of fraud charged in the bill, as to his acquiring a title to that farm. That the plaintiff, *A. Van Horne*, soon after his marriage with the plaintiff *Jane*, took possession of four or five acres of the premises, under some understanding that he should take a lease from the defendant, which, however, was not executed; and he was, afterwards, ejected by the defendant. He admitted, that the widow of *Jellis F.*

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continued on the *Caughnawaga* farm until her death; that she made a will in *February*, 1803, the substance of which was stated by the defendant, and made *John Yates* and the defendant her executors. That an inventory was taken of her effects, and a division made thereof, according to the bequest in the will, &c., and copies of the inventory and division were set forth in a schedule annexed to the answer. That the defendant took nothing. That he took possession, as executor of *Jellis F.* of three negroes, and disposed of them, according to a schedule annexed. That no stock or utensils were left on the farm; that the widow, *Henry V. F.* and his widow took every thing. He gave an account, in schedules annexed to his answer, of the rents and profits of the real and personal estate of *Jellis F.*, and stated that he did not receive enough to pay the debts and legacies. He admitted that the plaintiffs, *Jane* and *Jellis H. F.*, were entitled to a moiety of the surplus, if any, of the real and personal estate of *Jellis F.* excepting such parts as had been sold by the trustees named in the will, for the payments of debts and legacies. He denied, that he unfairly or fraudulently misapplied, or converted to his own use, any part of the estate. He stated various gratuitous expenses incurred by him in the education and maintenance of the plaintiffs, *Jane* and *Jellis H. F.*, which he alleged amounted to above 2,000 dollars.

A general replication was filed, and above forty witnesses were examined, and various documents and papers exhibited by the parties, respectively.

April 12th, 1821. The cause was brought to a hearing this day.

Henry for the plaintiffs. He made the following points:

1. That the defendant fraudulently prevented the persons nominated as executors with him by the will of *Henry V. Fonda*, deceased, from undertaking the executorship; and, afterwards, by intermeddling with the personal estate became executor *de son tort*.

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2. That the deed of the 3d of May, 1794, from *Henry V. Fonda*, and *Catlina* his wife, to the defendant, of *Brant Johnson's* 1000 acres, was not an absolute conveyance, but was intended to vest the title in the defendant, to enable him to make a compromise with the people of this State.

3. That the conveyance of the 24th of *April*, 1794, from the defendant to *Henry V. Fonda*, was not the consideration for the last mentioned deed.

4. That the defendant, either as the fellow tenant of *Henry V. Fonda*, or as an executor of the will of *Jellis Fonda*, is bound to account for half of the moneys received by him from the State, in extinguishment of the title to 2,000 acres of land in the royal grant, devised by Sir *William Johnson* to *Brant Johnson* and *William Johnson*, with interest, after deducting the sum of 620 dollars, paid by the defendant for the adverse claim of *Moses Johnson*, as the heir of *William Johnson*.

5. That if the defendant is not bound to account for the one half of such moneys, he is bound, as fellow tenant of *Henry V. Fonda*, and executor of *Jellis Fonda*, to account for one half of what was received for *William Johnson's* 1000 acres, after deducting what was paid for the adverse claim, with interest.

6. That the plaintiffs are entitled to redeem the lands and tenements mortgaged by *Henry V. Fonda* and wife to *Joseph Yates*; and that for that purpose, an account should be decreed between the defendant and the plaintiff; crediting whatever may have been unpaid upon the mortgage of principal or interest, and charging the defendant, with all rents reserved, or moneys which may have been in any wise received, or might have been recovered from the mortgaged premises, or any part thereof, with interest thereon; and also, for all moneys received on actual *sales* and conveyances, of any parts of the mortgaged premises; and that any parts of the same remaining unsold, be con-

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veyed by him to the plaintiffs, *Jane* and *Jellis*, free from all incumbrances.

7. That the sale of lot No. 2. in the royal grant, under the judgment in favour of *Adam Snell*, revived by the defendant, was fraudulent; and, therefore, the defendant should be decreed to account for the price at which the same was sold, with interest.

8. That the mortgage of the 10th of *January*, 1799, from *Henry V. Fonda* to *John Jacob Beekman*, and the defendant, as to the debt of 380*l.* pretended to be secured thereby to the defendant, was and is, set up and kept on foot, fraudulently, and ought, therefore to be so far disallowed; but, if taken into account, it should only be as to sums actually proved to have been paid.

9. That the sale of the *Caughnawaga* farm, was fraudulent and void, or purchased by the defendant in his character of executor *de son tort* of *Henry V. Fonda*, deceased; and that the defendant should be decreed to convey the same to the plaintiffs, *Jane* and *Jellis*, free from all incumbrances, after an account, charging him with rents and profits, and crediting him with actual expenditures for repairs only, and with any debts actually due to him from *Henry V. Fonda*, and any moneys actually paid by him for, or in the purhase of debts, really due by the said *Henry V. Fonda*, and with the value of the dower of the widow of *Henry V. Fonda* in the said farm, not, however, exceeding the sum paid by the defendant upon the conveyance to him, by her and her husband.

10. That the defendant should be decreed to account with the plaintiffs relative to the real and personal estates of *Henry V. Fonda*, deceased, and of *Jellis Fonda*, deceased, and of *Jannetje Fonda*, deceased, and for this purpose, to make a full disclosure of the real estates of the said *Jellis Fonda* and *Henry V. Fonda*, and to produce on oath, all papers, &c. in his power or custody, relating to either of such real or personal estates.

11. That if any allowance ought to be made, for the alleged support and education of the complainants, *Jane* and *Jellis*, it should be only for his actual expenditures, to be proved.

12. That the answer of the defendant is, in various important particulars, disproved, and utterly discredited, and, therefore, as to all affirmative matters, and all matters of avoidance, or discharge, stated or insisted upon, as a defence, should be disregarded, and proof thereof required, where such matters are competent as a defence.

Van Vechten, for the defendant, stated the following points:

1. That the defendant has not intermeddled with the estate of *Henry V. F.*, deceased, so as to become executor *de son tort*.

2. That the deed of the 3d of *May*, 1794, from *Henry V. Fonda* and wife, to the defendant, was absolute, and in consideration of the defendant's conveyance to *Henry V. F.*, of the 24th of *April*, 1794.

3. That the deed being absolute on its face, and for a valuable consideration, therein expressed, parol evidence in contradiction thereto is inadmissible.

4. That the defendant is not accountable for any portion of the moneys received from the State, for extinguishing his title to the lands in the *Royal Grant*, because the one thousand acres, devised by Sir *William Johnson* to *Brant Johnson*, were absolutely released to the defendant, by *Henry V. F.*, by the deed of the 3d of *May*, 1794; and the other one thousand acres were his own purchase, &c.

5. That the defendant is ready to account for such parts of the lands mortgaged by *Henry V. F.* to *Joseph Yates*, as he has sold, and for the rents and money received by him, deducting, however, the fifty acres released by *Henry V. F.* and wife to *Flint*, and the rents of the premises conveyed in trust by the defendant to the plaintiff *A. A. Van Horne*, for the use of his mother-in-law, *Henry's* widow, during life, and the premises conveyed to Dr. *Sherwood*, in satisfaction of his

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demand, for the board and education, &c. of the plaintiff, *Jellis H. Fonda*; and the defendant is also ready to convey the residue of said mortgaged premises to the plaintiffs, *Jane* and *Jellis*, on being paid what shall be ascertained, by a master, to be justly due him for *bona fide* debts owing to him from the estate of *Henry V. F.*, or for moneys paid out by the defendant, with which the said estate is justly chargeable.

6. That the mortgage of the 10th of *January*, 1799, to the defendant and *John Jacob Beekman*, is valid, for the amount therein expressed, with lawful interest, and remains unsatisfied.

7. That the purchase of the *Caughnawaga* farm was not fraudulent in point of fact; nor made by the defendant as executor, *de son tort*, of *Henry V. Fonda*; but if set aside, an account should be stated by a master, charging the defendant with the fair yearly value thereof, exclusive of the part set off for the widow's dower, (the fifty acres bought by *Evert Yates* from the loan officers, under *Henry V. F.'s* mortgage,) and the parcels conveyed by *Henry V. F.* to the *Caughnawaga* Church, and to settlers in the village of *Caughnawaga*, and crediting the defendant with actual expenditures for repairs, and permanent and beneficial improvements, and all sums justly due him from *Henry V. F.*, either for debts, or for moneys paid by him, for, or in purchase of debts owing by the said *Henry V. F.*, and also the one half of all *bona fide* advances made by the defendant, on account of the estate of *Jellis Fonda*, deceased, for debts, or for which the defendant is responsible, beyond the assets received by him as executor, or the value of the residuary real estate of the said *Jellis Fonda*.

8. That the defendant is ready to account, relative to any real or personal estate of *Henry V. Fonda*, (if any) for which this Court shall consider him accountable; and also of the

said *Jellis Fonda*, and to make any disclosures which may be in his power, and this Court shall direct.

9. That an allowance should be made to the defendant, for the support and education of the plaintiffs *Jane* and *Jellis*, and for the fair value of all advances made by him, to, or for them, or either of them.

THE CHANCELLOR. The bill seeks to call the defendant to an account, as executor of the estate of *Jellis Fonda* deceased, and, also, as executor of the estate of *Henry V. Fonda* deceased, and, generally, to make him account as trustee, acting for and on behalf of the plaintiffs, in the management and disposition of the estate, real and personal, of *Henry V. Fonda*.

The defendant admits himself to have been the acting executor of the estate of his father, *Jellis F.* and is ready to account for the personal estate, and the rents and profits of the real estate which he may have received. The great contest in the case is as to the character in which he acted, and the responsibilities which he has incurred, in respect to the estate, real and personal, of his brother *Henry V. F.*

1. He is charged with acting as executor of *Henry*, and that charge he denies. But it appears to be sufficiently supported by the testimony. One witness, *Peter Fonda*, says, that he took possession and disposed of a great part of the personal estate of *Henry V. F.* and offered to sell to the witness several articles of farming utensils on the farm of *Henry V. F.* and the witness purchased a wood sleigh, and paid the defendant the price of it. So, it is in proof that he paid a debt due from *Henry V. F.*, at his death, to *John M'Carthy*, and another debt due from *Henry V. F.* to *Marks Dockstader*; and in the last case, the debt was frequently demanded of him, and he was threatened to be sued for it. He received payment of a debt due from *S. Kittle* to *Henry V. F.*; and, in another case, he demanded,

An executor named in a will, and who never qualified as such but who took possession of some part of the personal property of the testator, and paid some of his debts; was held, by these acts, to have elected to act as an executor, and was chargeable as executor.

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and received payment, of a debt due from *M. B. Wemple* to *Henry V. F.* These multiplied acts are decisive proof of his election to assume the trust and act as executor. They would have made him an executor *de son tort*, if he had not been named an executor in the will, and the same acts amount to an assumption of the office of a rightful executor.

I shall, therefore, consider all his acts, in relation to the estate of *Henry V. F.* as the acts of a person who was at the same time clothed with the office of executor.

2. The bill charges that the defendant received, in *March*, 1799, from the government of this State, 6,500 dollars, as a compensation for the extinguishment of the right derived from *Jellis F.* to 2000 acres of land in the *Royal Grant*, and that the plaintiffs are entitled to a moiety of that sum, with interest. The defendant admits that the sum received was 6,250 dollars, but he claims title to the whole of it; and contends, in the first place, that his father, *Jellis F.* was only entitled, in his life time, to 1000 acres, inasmuch as *Brant Johnson*, who sold him the 2000 acres, owned only a moiety of it, and that the other moiety belonged to *William Johnson*, a brother of *B. Johnson*. He contends, in the second place, that his brother *Henry*, by his deed of the 3d of *May*, 1794, conveyed to him in fee, and absolutely, without any reservation or trust, his interest in the 1000 acres, for the consideration of 100 pounds, and which consideration was paid by a deed from the defendant to *Henry*, of the date of the 24th of *April*, 1794, of two lots in the *Royal Grant*, and containing the like consideration.

It is to be observed, as we proceed, that the defendant, and his brother *Henry* were joint and equal residuary devisees of their father, *Jellis Fonda*.

There is reason to believe that the deed of the 24th of *April*, was not given as the consideration of the deed of the 3d of *May* following. The want of concurrence in dates

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raises that presumption, especially as that want of concurrence is left without any explanation. In the next place, it is in proof, by the testimony of *Simon Veeder*, who took the acknowledgment of the deed of the 3d of *May*, and delivered the deed over to the defendant on the same day, that *Henry* observed, at the time, that *the deed to Jellis F. his father, was deficient.* The certificate of acknowledgment bears date the 31st day of *May*, 1794, but the certificate of acknowledgment of the prior deed of the 24th of *April*, bears date the 2d day of *August*, 1794, and both the acknowledgments were made before the same judge. The defendant was present when the acknowledgment of the deed of the 3d of *May* was taken; and when the deed was handed to him, he observed that the consideration mentioned in the deed *was not the value* of the property, *but he took the deed in order to save something for the children of his brother, as his brother was pretty much involved in trouble.*

These observations of the parties made at the time of the execution of the deed, are evidence that the deed was not taken as an absolute purchase of the right of *Henry* to the 1000 acres; and they are evidence that it was taken *in trust*, and, probably, with a view to facilitate a compromise with the State, according to the charge in the bill. The testimony of *Evert Yates*, and *James Lansing* shows that the deed of the 3d of *May* was not considered by the defendant as an absolute purchase of the right of *Henry*, and paid for, by the prior deed of the 24th of *April*. When the executors of *Henry* met, soon after his death, the defendant told *John Fonda*, who asserted *Henry's* interest in the money received upon the compromise, that *Henry* had no such interest, for his father's title was incomplete, and he had since purchased up the Indian title of *William Johnson*, and considered it a speculation of his own. Here was no suggestion that he had actually bought in the right

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of *Henry*, a reply that would naturally have suggested itself, if such had been the fact.

It is also admitted, by the answer, that the title of *Jellis F.* to the 2000 acres, had been conveyed by him, in his life time, to *Abraham G. Lansing*; and that as the title proved partly defective, the defendant and his brother *Henry*, as the representatives of their father, had conveyed to *Lansing*, in 1793, other lands to the amount of 2650 acres, derived to them from their father, in lieu of the two thousand acres; and that *Lansing* had then released his right to the 2000 acres, to the defendant and *Henry*. The 2000 acres were thus received back into the funds of the estate, as a substitute for the 2650 acres which had been transferred; and the two brothers became equally entitled, as tenants in common and residuary devisees of *Jellis F.*, to all the right and interest, in law and equity, of their ancestor to the 2000 acres. The defendant, afterwards, on the 29th of *May*, 1795, purchased of *Moses Johnson*, the heir of *William Johnson*, for 600 dollars, his right and title to 1000 acres, being part and parcel of the 2000 acres originally purchased by *Jellis F.* from *Brant Johnson*. The question, then is, whether the defendant did not make that purchase for the joint benefit of himself and his brother *Henry*. If the deed of the 3d *May* 1794, was given to the defendant, in trust for the purpose of facilitating the acquisition of a good title, then the purchase from *Moses Johnson*, was in trust for their joint benefit. The defendant has not interposed and pleaded the statute of frauds against setting up a trust by parol, in opposition to the deed of the 3d of *May*, 1794; and we are left at liberty to judge of the truth and effect of the parol proof. I am strongly inclined to believe, that the deed was taken in trust, and that the subsequent purchase from *Moses Johnson* was made in trust, and that *Henry* was equally interested in the settlement made with the State, in *March* 1799; and that his representatives are entitled

to a moiety of the payment received from the State, (which payment amounted to 6,500) after allowing to the defendant, the payment he made to *Moses J.* and a just indemnity for his expenses in procuring the satisfaction from the State.

In some cases, says *Littleton*, (sec. 307) a release to one joint tenant shall aid the joint tenant to whom it was not made, as well as him to whom it was made. I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim, to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which case all are entitled to the common benefit, on bearing a due proportion of the expense. It is not consistent with good faith, nor with the duty which the connexion of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine, and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees created. Community of interest, produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseize and expel his co-tenant. It cannot be tolerated, when applied to a common subject, in which the parties had equal concern, and which created a mutual obligation, to deal can-

Admitting that one tenant in common may, in some cases, purchase in an outstanding title, for his own benefit; yet where two devisees are in possession of land, under an imperfect title, devised to them, by their common ancestor, one of them cannot buy in an outstanding title, so as to disseise or oust his co-tenant; but such purchase will enure to their common benefit, subject to an equal contribution to the expense.

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didly and benevolently with each other, and to cause no harm to their joint interest. I have no doubt, therefore, that in a case like the present, and assuming what the evidence warrants us to assume, that the deed of *May*, 1794, was taken by the defendant for trust purposes, that the purchase from *Moses Johnson* ought, in equity, to enure for the common benefit, subject to an equal contribution to the expense.

3. The plaintiffs are entitled to redeem the lands mortgaged by *Henry F. Fonda* to *Joseph Yates*, and to make the defendant account for the proceeds of such parts of those lands as have been sold by the defendant, (which sale the plaintiffs are willing to confirm) and for the rents and profits which have been received, subject to whatever payments have been actually made by the defendant upon that mortgage. The lands included in the mortgage, purchased in by the defendant, and remaining unsold, ought to be conveyed to the plaintiffs, free from incumbrances.

The defendant admits, that he purchased and took an assignment of this mortgage, on the 4th of *February*, 1800, and proceeded to advertise and sell the mortgaged premises, under a power contained in the mortgage, in *August*, 1800, and that he became the purchaser himself. The defendant, in his answer, denies that he ever said, or admitted, that he bought in and held the mortgaged premises for the benefit of the plaintiffs, but alleges that he meant to reimburse himself for the mortgage debt, and then pay the debts still owing by the estate of *Jellis Fonda*, deceased, and then appropriate the surplus, "according to his own discretion," to assist the plaintiffs and their mother. He admits, however, that the sale under the power was void, owing to the minority of *Henry V. F.* when he gave the power; and in his letter to *W. Hammond*, of the 1st of *May*, 1804, he says, that he *always intended* to account for the mortgage to the heirs, or executors, of his brother. Whatever his

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intentions on this subject might have been, (for the answer and this letter do not entirely agree,) yet the purchase under the sale, was in judgment of law, in trust for the plaintiffs. Being executor of *Henry V. F.*, he had no right or power, to extinguish the mortgage, or other debts, for his own benefit, or to traffick with the estate for his own emolument. If a trustee or executor compound debts or mortgages, or buy in for less than is due, he shall not take the benefit of it to himself, for when he takes a trust, he is to take it for the benefit of the *cestui que trust.* He cannot be permitted to raise in himself, an interest opposite to that of the party for whom he acts. This is a fundamental doctrine in equity. (2 *Fonb.* b. 2. c. 7. sec. 7.) The haste with which that purchase of the mortgage was made, and the sale under the power effected subsequent to his brother's death, affords a very unfavourable specimen of the spirit with which he dealt with his brother's estate.

An executor or trustee cannot buy in a mortgage, judgments, or other debts of the testator, or *cestui que trust*, for his own benefit; nor can he deal or traffic with the estate for his own emolument.

The defendant says, in his answer, that he purchased up a judgment of *Adam Snell* against *Henry V. F.*, on the 4th of *September*, 1800; that he revived the judgment in 1814, against the plaintiffs, and sold a lot of 100 acres in the *Royal Grant* covered by *Yates's* mortgage, for 853 dollars and 97 cents, and purchased it in himself. He purchased in the judgment in 1800, for 445 dollars and 37 cents.

Here was also a breach of trust; for an executor is not permitted to buy in a debt, and then, afterwards, make that debt the means to sell, and buy in the property for his own benefit. The defendant can only be allowed, in his account, for the payment of whatever was justly due to *Snell*, when he took the assignment of his judgment in 1800, and he must account for the price for which the lot was sold under his judgment, with interest. The judgment of *Snell* was satisfied, by his purchase of it, as executor, in 1800.

4. Another charge in the bill, is, that the defendant, in

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October, 1807, fraudulently sold, and purchased in, on his own account, a farm of 300 acres and upwards, at *Caughnawaga*, belonging to the plaintiffs, as children of *Henry V. F.* It is charged, that the defendant sold, under two small judgments, which had been obtained against the plaintiffs, as heirs and devisees of *Henry V. F.*, and which judgments he then claimed by assignment, one entire farm, worth, at the time of the sale, upwards of 10,000 dollars; and that the circumstances attending the sale denote premeditated fraud. This is the gravest charge in the bill, and one that is most satisfactorily supported.

The answer admits the existence of a judgment of *M. B. Wemple*, of the 7th of *August*, 1807, for 321 dollars and 36 cents, and another judgment of *Peter Putnam*, of the 3d of *August*, 1807, for 265 dollars and 48 cents, and that the farm of 272, 1-2 acres, was sold, by executions on those judgments, on the 28th of *October*, 1807, and purchased by the defendant, for 520 dollars; and he says, that he purchased fairly, on his own account, and without any trust in favour of the plaintiffs, and denies, that he had any interest in those judgments, or any control over the executions. He says, that the farm was, at the time, subject to a mortgage to *John J. Beekman* and himself, of the 10th of *January*, 1799, for 1,347 dollars, and to a judgment in favour of *John Davis*, for 250 dollars, and to the balance of a judgment in favour of *Stevenson* and *Douw*, for 135 dollars and 32 cents. These two latter judgments, he says, had been assigned to him, in *September* and *November*, 1799, and that there was due, at the time of the sale, on those three incumbrances, 2,937 dollars and 66 cents. He says, further, that he then owned *Beekman's* interest in the mortgage, in right of his wife, and that he purchased to secure his three incumbrances, and some other debts of his brother *Henry*, which had been assigned to him.

It is abundantly in proof, that the farm was worth about 10,500 dollars, at the time of the sale; and that from two

to eight or ten acres from the east side of it, would, upon a sale have satisfied the two executions. Let us now see how far this answer is contradicted by the proof.

The defendant, at the time of the sale, did own the judgment and execution of *Wemple*. It is proved by *Wemple* himself, that the defendant sent proposals, before the sale, to him, to buy his judgment, and take an assignment of it, and he said he *intended to use it for the benefit of the plaintiffs*. *W.* went to the house of the defendant, and agreed to sell and assign the judgment to him, who paid for it, 247 dollars and 71 cents. He then agreed to meet the defendant, near the place of sale, the evening before, to execute the assignment, and the defendant requested the witness to keep the meeting a SECRET, for fear the neighbours would get the land from him, *and the children would not be able to have it.* They met, accordingly, at the place appointed, and the witness executed the assignment, and when the defendant took it, he said, *he took it for the purpose of purchasing the lands for the benefit of the plaintiffs, the children of Henry.* The day after the sale, he told the witness, he had purchased the farm *for the children.* It is further proved, by *James M'Intyre*, the sheriff, that on the day of the sale, he received the assignment of *Wemple's* judgment, in satisfaction of the execution; that the assignment had been executed before the day of sale, and he received it, either from the defendant, or from *D. Cady*, the attorney to the execution.

Here, then, the answer is falsified in one essential point. It is also contradicted by the proof, in respect to the circumstances of the sale, and the declared purposes under which the defendant became the purchaser. We have already observed, that he frequently declared to *Wemple*, that he took the assignment of his judgment, and made the purchase, for the benefit of the children.

The defendant, before the sale, declared to *Abraham Van Horne*, that he would *be a father to the plaintiffs, and take*

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care of their property. This led that witness to infer, that he would purchase in the farm for their benefit. He said to *Jacob Van Alstyne*, on the day of sale, that he gave for the farm 520 dollars, and *should not have got it so, but he bought for the children*, and that he told those who attended the sale, that he *intended to purchase for the benefit of the children of Henry*. *Daniel Cady* was the attorney to the two executions, and he attended the sale, and bid up to the amount of them; he heard nothing about incumbrances, and was informed that the defendant had the charge of the plaintiffs, and was, in some measure, providing for them; he says, that if he had not supposed *that*, he never would have suffered the farm to have been struck off for the amount of the executions. *M'Intyre*, the sheriff, testifies, that at the sale, one *Rust* was present, and bid once or twice, and then asked, if the property was to be bidden off for the benefit of the children of *Henry*, and that either the defendant, or the witness replied, that *it was*, and *Rust* then desisted from bidding. If the witness so replied, it was from express information received from the defendant; for, before the day of sale, and on the morning of the day of sale, the defendant told the witness, that he intended to purchase in the premises for the benefit of the children of *Henry*. He says, that the farm was not declared to be sold, subject to any incumbrances. It appears, also, by the testimony of *Peter Putnam*, that on, and after the day of sale, the defendant declared, that *he meant the farm for the children*. The defendant made the same declaration to *Evert Yates*, and observed, that he had *purchased the farm for the benefit of the children*, and that they should have it, upon paying him back his money, with interest; and it was for that reason that the witness sold him thirty acres adjoining the farm so purchased, and which thirty acres had been detached from the farm, by means of a sale under a loan office mortgage.

These witnesses prove the answer to be false, in respec

to the avowed character in which the purchase was made, and the alleged fairness of the sale. It is satisfactorily shown, that the defendant did assume to buy, in the character of trustee, for the plaintiffs, who were then infants, (the one being fifteen and the other twelve years of age,) and did, by that means, stifle competition, and was enabled to buy in the estate, for a comparatively nominal sum. To appropriate the whole purchase afterwards to himself, as a speculation, was a gross breach of his duty, as a trustee. It necessarily follows, that he is answerable for that purchase, in the character which he had assumed; and considering that he was the owner, at the time, of one of the judgments, and had the control of one of the executions, and that a large and valuable farm was sacrificed under false pretences, when only a very inconsiderable part of it would have satisfied the executions, we are required, by the most obvious principles of justice, to make the defendant account for that purchase. And it is worthy of notice, that the defendant admits, in his answer, that he visited his brother a few weeks before his death, and that the latter expressed great solicitude about his children, when the defendant voluntarily told him, *he would take care of his children.* He thus stood, in all his subsequent transactions, *in loco parentis*, and was under the most sacred obligations, to execute the trust with parental fidelity.

5. The defendant sets up, as a debt against the estate, a mortgage executed by *H. V. F.* to *J. J. Beekman* and himself, on the 10th of *January*, 1799, on the *Caughnawaga* farm, to secure the payment of 157*l.* to *Beekman*, with interest from the 21st of *June*, 1797, and of 380*l.* to the defendant, with interest from the date. This mortgage debt was one of the incumbrances upon the farm, which the defendant says induced him to make the purchase; and he says, the mortgage debt to him was founded upon notes to that amount, which he previously held against *Henry*, and which notes were then delivered up.

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There is reason to believe, that this mortgage debt had been satisfied even prior to the death of *Henry*; or that it was originally created either by imposition, or upon some secret trust not disclosed, or to meet future responsibilities not incurred.

When the defendant met with the other executors of *Henry*, shortly after his death, he exhibited a statement of the debts due from the estate of *Henry*; and he admits that it was a statement of debts owing by *Henry*, "as far as the same had then been ascertained." In that statement, he entirely omits his demand under that mortgage, and there is no accounting for the omission. He mentioned the debt due under that mortgage to *Beekman*, amounting, as he stated, to 160*l.*, and his attention, therefore, must have been directed to that very mortgage. One of the witnesses who was present when the statement was produced, (*James Lansing*,) said, that the defendant was asked, if he had any claim, and he replied, that *was a matter of no consequence.* There is another document in proof, still more decisive; and that is the *book of accounts* of *Henry V. F.*, containing entries in it, admitted to be in the handwriting of the defendant. In one place, the defendant writes against an account of *Henry* against him, "By cash in full, *September* 1st, 1796?" and in another place, on the credit side, *by your note of* 1st and 2d *September*, 60*l.* And this credit is given as of the date of *June* 21, 1797. And in another place, of the date of *April* 13th, 1799, the defendant adds, "*by a settlement made, and I am due on this account to my brother a balance of* 41*l.* 19*s.* 1*d.* *To my note for the above, in full*, 40*l.*" And then he adds below, "To an abatement, ... £1 10 0

"To balance short, ... 0 9 1

£41 19 1"

Could the mortgage debt be subsisting, after this settlement? Can this note of 40*l.*, which he thus applied, only thirteen days before his brother's death, as a set-off, be the

100 dollars, which he says he lent to his brother a few days before his death? Can that 100 dollars be still a subsisting debt?

These entries, in his own hand, and the omission of either of those debts in the statement, are sufficient to put him upon the proof of any debt originally due to him, under that mortgage, or otherwise. The defendant ought, therefore, not to be allowed, in accounting before the master, for the mortgage debt of 380*l.*, *on the foot of the mortgage*, and he ought not to be allowed any part of that debt, or any other debt of his own, against the estate of *Henry*, without satisfactory proof of its subsisting, at the death of *Henry*. He ought, also, to be decreed to convey the *Caughnawaga* farm to the plaintiffs, free from incumbrances, and he ought to be charged with the rents and profits, and credited with expenditures for actual repairs, and with moneys actually paid by him for, and in the purchase of debts really due by *Henry*, and also with the value of the dower of the widow of *Henry* in the farm, not, however, exceeding the sum paid by the defendant, upon the conveyance to him, by her and her husband. The defendant ought not to be absolutely precluded from showing the existence of any debt due from *Henry* to him, provided, he can prove it to entire satisfaction, independent of the mortgage, or note, which he might produce. He ought to be put to show the circumstances, and how it arose, and when; and to reconcile its existence with the entries made by him in his brother's book. "A bond or mortgage," says Lord *Talbot*, in *Piddock* v. *Brown*, (3 *P. Wms.* 289.) "is, *prima facie*, good evidence of a debt. But, whenever there are manifest signs of fraud in the obligee, he ought to be put to the proof of actual payment; and though he may happen thereby to lose some part of the money really due to him, for want of being able to make sufficient proof, this is but a just punishment of him for the fraud."

Nor do I think that the defendant ought to be allowed,

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under the circumstances of this case, for what might, otherwise, be deemed beneficial improvements made by him on the *Caughnawaga* farm. He entered in his own wrong, and held under a claim of title, procured by fraud, and he is not entitled beyond the amount of his actual expenditures. Every thing beyond that was gratuitous. A fraudulent possessor is never allowed for beneficial improvements. (2 *Johns. Ch. Rep.* 602.)

The defendant ought, in addition to the *items* already noticed, to be directed to account, generally, relative to the real and personal estates of *Jellis F.* and of *Henry V. F.*, deceased, and also of *Janneije*, the widow of *Jellis F.* He ought also to be examined, if required, upon oath, and to produce all papers, in his custody or power, relative to those estates; and to be allowed for actual expenditures, for board, clothing, and education of the plaintiffs, or either of them; but all affirmative matters stated in the answer, and all matters set up by way of avoidance, or discharge, and which are competent, as a defence, must be satisfactorily proved. I shall direct a reference to a master, to take and state an account, upon the principles, and under the directions already declared.

Decree accordingly.

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RODRIGUEZ v HEFFERNAN.

RODRIGUEZ *against* HEFFERNAN and others.

A. and *B.* being concerned together in commercial adventures to *S. America*, *A.*, unknown to *B.*, who was abroad, assigned over the whole of a return cargo to *C.*, to secure the individual debt of *A.*, who was insolvent; and *C.* knew, at the time, there was a running account between, *A.* and *B.*, arising from these mercantile adventures, though he was ignorant of the nature or extent of the transactions between them, or of the amount of interest, if any, of *B. Held*, that *C.* having sufficient notice of the rights of *B.* to put him on inquiry as to the extent of his interest, took the assignment subject to all the rights and equities of *B.*

A factor cannot pledge the goods of his principal, even though the creditor has no notice of his being a factor.

An assignee of one partner is entitled only to his share, after a settlement of the accounts of the partnership, and all the just claims of the co-partner are satisfied.

May 31st and July 30th.

BILL, filed *February* 5th, 1820. It stated, that the plaintiff, *Vincente Rodriguez*, formerly of the province of *Carracas*, being in the city of *New-York*, in 1813, he, at the request of *H.*, became jointly interested with him, in an adventure from *New-York* to *Laguira*, by the schooner *Louisa*. (Captain *Esquiningo*.) That the vessel proceeded to *Laguira*, and after her cargo had been disposed of, and a return cargo laden on board, she was captured, on her return, by a *British* cruizer, and carried into *Halifax*, where the vessel and cargo were condemned. That the *United States* were then at war with *Great Britain*, and in order to protect the property and interest of *H.* from seizure, the adventure was conducted solely in the name of the plaintiff, who was a subject of the King of *Spain*. That the defendant *H.* was jointly and equally interested with the plaintiff in the adventure; that *H.* had received very considerable sums of money, arising from sales of parts of the outward cargo,

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at *Laguira*, and considerable sums in consequence of the decree of condemnation having been reversed, and for which he had not accounted to the plaintiff. That in 1816, *H.* purchased in his own name, but for the joint benefit of himself and the plaintiff, the brig *Active*, and has received considerable sums of money for her freight and earnings, for which he has not accounted to the plaintiff. That the plaintiff and *H.*, previous to the last of the year 1818, had various other dealings together, in which the plaintiff paid large sums of money to the defendant *H.*, and *H.* also received large sums of money on account of the plaintiff, and also, large quantities of goods belonging to the plaintiff, in whole or in part, and which were, afterwards, sold by the defendant *H.*, who converted the proceeds to his own use, and of which he has rendered no account to the plaintiff. That in *December*, 1818, the plaintiff caused to be laden on board the schooner *Good Hope*, then lying at *Porto Cabello*, in *S. America*, a cargo to the value of 15,000 dollars, belonging wholly to the plaintiff. That this schooner sailed from *Porto Cabello* for *New-York*, consigned to the defendant *H.* The plaintiff was then a naturalized citizen of the *United States*, but residing in the province of *Caraccas*, and well known to the owners of the patriot privateers; and to cover the property from loss by these privateers, it was agreed between the plaintiff and *H.*, that the cargo should be shipped in the name of *H.*, to whom the schooner belonged. The cargo was purchased with the money of the plaintiff, and wholly belonged to him; and *H.* was, at that time, indebted to the plaintiff, above 12,000 dollars. That the *Good Hope* arrived in *New-York*, in *February*, 1819; and *H.*, who had then stopped payment, took possession of the cargo, and assigned and delivered it to the defendants, *Gebhard* and *Beeckman*, as security for a debt, and they have since sold the cargo, and converted the same to their own use. That

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at the time of the assignment by *H.* to them, *G.* and *B.* were informed, and knew, that the cargo belonged solely to the plaintiff. *H.*, at the same time, sold and conveyed to *G.* and *B.*, to secure a debt, the brig *Active*, of which he and the plaintiff were joint and equal owners; and *G.* and *B.* knew, at the time, that one half of the brig belonged to the plaintiff; That the defendants refuse to render any account to him, &c. *Prayer*, for a true account of the cargo of the *Good Hope*, which has come to the possession of the defendants, and how they have disposed of the same; and that they be decreed to account and pay the plaintiff the amount of the proceeds of the cargo, and for one half of the brig *Active*; and for general relief.

The defendant *H.*, in his answer, admitted his concern with the plaintiff, in the adventure to *Laguira*, but he stated that part of the proceeds of the outward cargo, remaining after the purchase of the return cargo, was remitted to the plaintiff at *New-York*, in indigo, and the residue, if any, was never received by the defendant; and he averred that he rendered to the plaintiff a true account of the adventure, and of what had been received, in *May* or *June*, 1819. He denied that he ever received any thing on account of the reversal of the decree of condemnation at *Halifax*. That in *August*, 1819, he received a letter from the agents in *London*, who had the management of the appeal, informing that the cargo was restored on paying the captain's expenses, and that the whole sum decreed to be restored was consumed in costs. That the loss by reason of the capture, was 17,700 dollars and 98 cents, and the defendant rendered to the plaintiff a full account of the cargo so captured. That in 1816, this defendant purchased the brig *Active*, solely on his own account; but having agreed to employ her as a trader, between *New-York* and *Laguira*, to carry cargoes on the joint account of the plaintiff and himself, he agreed that they should share the profit and loss of the brig, equally between them. That in 1819,

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he rendered to the plaintiff, a just and true account of all the freight and earnings of the brig. That in 1818, the plaintiff and defendant, *H.*, had other dealings together, and it was agreed that the plaintiff should have half of the profits of the joint adventures, and a commission of five per cent. on all sales, and four per cent. on all returns, and the half of the defendant's commission. That on the 4th of *November*, 1819, a general account current between the plaintiff and the defendant was stated, and a considerable balance found due to the defendant. He admitted that he made a shipment in *November*, 1818, on their joint account on board of the schooner *Good Hope*, to the amount of 6738 dollars and 41 cents, exclusive of freight, assigned to the plaintiff at *Porto Cabello;* and a shipment of a return cargo by the plaintiff in the name of the defendant exclusively, for the reason stated in the bill, but on the like equal and joint account, amounting, according to the invoice, to 12,091 dollars and 73 cents. He denied that the return cargo belonged wholly to the plaintiff, or that it was purchased wholly with the moneys of the plaintiff; but he averred that it was purchased with the proceeds of the outward cargo and of prior shipments made on their joint account. That it was probable, that the defendant was, at that time, indebted to the plaintiff, but it was impossible to ascertain the amount, without a final settlement of their accounts. He admitted that he stopped payment on the 30th of *December*, 1818, a few days before the arrival of the return cargo, by the *Good Hope;* and insisted, that he had a joint and equal interest in that cargo, and full power, by reason of that interest, and of a letter of attorney, to dispose of the whole cargo, *bona fide*, and to give the plaintiff credit in account, as he has done, for his share of the proceeds. That in *October*, 1818, he assigned property to the other defendants, *G.* and *B.*, to secure loans and advances made by them to this defendant, to about 25,000 dollars, and which were afterwards increased to 45,000 dollars. That on the 27th of *November*, 1818, as further

security, he assigned to *G.* and *B.* the outward cargo of the *Good Hope*, and two policies of insurance on vessel and cargo, and the vessel, and also the brig *Active*. That on the 28th of *December*, 1818, he sold and assigned to *G.* and *B.* the return cargo of the *Good Hope*, which two assignments were made upon the like trusts as the former assignments of property, that is, in trust, to pay *G.* and *B.* the amount due to them, or thereafter to become due, and their lawful commissions, and to account to *H.* for the surplus. That on the arrival of the *Good Hope*, in *January*, 1819, he endorsed the bills of lading and invoice of the cargo to *G.* and *B.*, who took possession of, and sold the cargo, and applied the net proceeds, amounting to 13,273 dollars and 65 cents, towards payment of the debt due to them from him; and that he had credited in his account with the plaintiff, the sale of the return cargo, as being 10,722 dollars and 65 cents, after deducting the freight, to which the defendant was entitled, as the vessel wholly belonged to him. That *G.* and *B.* sold the brig *Active*, *April*, 1st, 1819, and applied the net proceeds, being 3,828 dollars, towards the payment of the debt due to them from *H.* That a large proportion of the advances to the defendant, and equal to the estimated convertible value of the return cargo of the *Good Hope*, and of the brig *Active*, was made by *G.* and *B.* on the faith of the security of the said cargo and brig, &c. That he presumed *B.* knew, or had reason to believe, that there was an open and running account between the plaintiff and the defendant *H.*, but *G.* and *B.*, or either of them, did not know, nor had reason to suspect, that the plaintiff and *H.* were jointly and equally interested in the return cargo of the *Good Hope*, or that the plaintiff had any interest in the brig *Active*, and which the defendant wholly denied. That the assignments to *G.* and *B.* were *bona fide*. That on the 22d of *May*, 1811, the plaintiff, by a letter of attorney, empowered the defendant to receive and discharge debts, to receive and dispose of

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goods of the plaintiff, and act fully, in all things, for him. The defendant averred, that he was authorized to dispose of the brig *Active*, as she belonged exclusively to him; and of the return cargo of the *Good Hope*, by reason of his interest therein, and of his power of attorney. That he is, and always has been, ready to render a true account, &c. That on the 7th of *January*, 1819, he assigned to *W.* and *S. Craig*, for the benefit of his creditors, the surplus of the property assigned to *G.* and *B.*, after paying what was due to them. That on the 9th of *May*, 1821, having assigned all his property to *W.* and *S. C.*, he was duly discharged, under the act, &c., from liability to imprisonment, &c., and he objected that the assignees were not made parties to this suit.

The defendant *G.*, in his answer, averred that *H.*, being somewhat embarrassed in *October*, 1818, applied to the defendants *G.* and *B.* for aid, and promised to assign to them, as security, certain vessels and a cargo, as mentioned. That *B.* agreed, from friendship to *H.*, to advance him 25 or 30,000 dollars, and at various times during the period of one year after, they advanced to the defendant *H.*, in pursuance of the agreement, and on faith of the security, 47,000 dollars. The defendant then stated the property assigned to *G.* and and *B.*, as security for the advances, and particularly the brig *Active*, and the outward cargo of the *Good Hope*, on the 27th of *November*, and her return cargo, on the 26th of *December*, 1818, pursuant to the agreement above mentioned, and upon the same trusts; and that the invoice and bill of lading of the return cargo was endorsed to them in *January*, 1819. That the invoice was signed by the plaintiff, and recited that the return cargo was shipped by the plaintiff, on the account and risk of the defendant *H.*, and consigned to him. That *G.* and *B.* took possession of the return cargo, and sold it for the net sum of $13,272 65 cents and they also sold the brig *Active*, for 3803 dollars, and applied the same, as well as the proceeds of all the other property assigned to them, to satisfy the advances made by

them, and that a large balance still remained due to them. The answer denied all knowledge of any interest of the plaintiff, or of any other person, except *H.*, in the property so assigned and sold. It stated farther that the register, &c. of the brig *Active* was in the name of *H.* alone, and that *H.* always represented himself as sole owner of the brig and of the return cargo of the *Good Hope*, and that the greater part of the advances were made by *G.* and *B.* on the faith of that representation. The answer of *B.* was substantially the same as that of *G.* He admitted that he knew or had reason to believe that the plaintiff and *H.* had a running account between them, arising from mercantile adventures to *S. America*; but whether they were partnership transactions between them, or whether the plaintiff was merely the agent and factor of *H.*, or had any interest in the return cargo, &c., he did not know, until after the filing of the bill of the plaintiff. He admitted that, since the bill was filed, *H.* had informed him, that the plaintiff was jointly and equally interested in the return cargo of the *Good Hope*.

May 31*st*. The cause was brought to a hearing on the pleadings and proofs.

D. B. Ogden and *S. Jones*, for the plaintiffs. To show that a factor could not pledge the goods of his principal, whether the purchaser had notice or not, they cited, *Str.* 1178. 5 *Vesey*, 511. 2 *Mass. Rep.* 398. 1 *Maule & Selw.* 140. 480. 3 *Atk.* 144. 1 *Liverm. on Agency*, 129, 130. To show that one partner cannot bind his co-partner for any thing beyond the scope of the partnership, they cited, 4 *Johns. Rep.* 251. 262. *note*. 2 *Caines*, 246. 2 *Johns. Rep.* 300. *Watson on Part.* 180. 3 *Term. Rep.* 757. 1 *Salk.* 126. 1 *Lord Raym.* 175. 1 *East*, 49. 55. 6 *Vesey*, 604.

P. A. Jay and *T. A. Emmet*, for the defendant. They cited 1 *Maule & Selw.* 140. 146. 6 *East*, 19. 7 *East*, 210. 1 *Bos.* and *Pul.* 648. 1 *Rose's Bankrupt Cases*, 297. 9 *East*, 506.

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July 30th. The cause stood over for consideration, until this day.

THE CHANCELLOR. The sole question in the case is, whether the defendants, *G.* and *B.*, are accountable to the plaintiffs for the proceeds which they have received of the return cargo of the schooner *Good Hope*. The defendants, *G.* and *B.*, claim those proceeds, (which amount, after deducting all charges, and the freight, to the net sum of 10,722 dollars and 65 cents,) by virtue of an assignment from the defendant *H.*, of the 26th of *December*, 1818, executed about the time the vessel sailed from *Porto Cabello*, in *South America*, for *New-York*. The plaintiff alleges, that the cargo was exclusively his property, though covered with the name of the defendant *H.*, in order to protect it from *Spanish* cruizers; and the defendant *H.* admits, that the plaintiff had a joint and equal interest with him in that cargo.

The answers of the defendants, *G.* and *B.*, disclose the manner in which the assignment was taken, and the causes which led to it. They state, that in *October*, 1818, the defendant *H.*, being somewhat embarrassed in his pecuniary affairs, applied to them for assistance, and he promised to assign to them, by way of security for advances, certain vessels and cargoes, "as hereinafter mentioned." They accordingly did advance, as they say, "at various times, during the period of one year after the said agreement," 47,000 dollars, and upwards, and the defendant *H.*, in execution of that agreement, assigned to them, by deed of the 4th of *November*, 1818, and in trust, to secure the payment of 40,000 dollars, then already advanced, a vessel and two cargoes therein mentioned, and which form no part of the present controversy. The defendants, *G.* and *B.*, were to apply the proceeds to the payment of the moneys due, and to become due to them, and to re-assign, or account for the

surplus. On the 17th of *November*, the defendant *H.*, in further execution of the agreement, and for the more effectual security of *G.* and *B.*, assigned to them the brig *Active*. The property hitherto assigned, belonged to the defendant *H.* On this point, there is now no question between the parties; for a claim to a joint interest in the *Active*, was waived at the hearing. The next assignment was of the date of the 27th of *November*, 1818, and was given as a further security to *G.* and *B.* It assigned the outward cargo of the schooner *Good Hope*, then on a voyage from *New-York* to *Porto Cabello*, and which had been shipped on the 7th of *November*, together with the vessel, and the policies covering the vessel and cargo, and it was made upon the trusts expressed in the first assignment. Then followed the assignment of the return cargo, made on the back of the assignment of the 27th, dated on the 26th of *December*, 1818, and which was declared to be given for the purposes, and upon the trusts expressed in the other assignments.

This last assignment was evidently taken to secure *antecedent* advances. There is no evidence, that any advance or loan was made upon the credit of it. The defendant *H.* stopped payment, and consequently avowed himself a bankrupt, on the 30th of *December*, and only four days after, this assignment was made. It was taken from an insolvent debtor, on the eve of bankruptcy, as additional security for an existing debt, and ought to be subjected to all the strictness applicable to an instrument taken at such a crisis. It was not a security taken in pursuance of the original agreement, in *October*. That agreement related to certain vessels and cargoes "hereinafter mentioned;" but the defendants must be understood, by these words, to refer to the subjects specified in the first assignment, and not to the return cargo in this case, for the outward voyage itself had not then commenced. It is very probable, that the defendants *G.* and *B.*, from the knowledge which the defendant *B.* had of the mer-

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cantile adventures of the defendant *H.* with *South America*, did not wish, or intend to meddle with that property, or it would have been included in the assignment of the 4th of *November*. The voyage was in contemplation by *H.*, as early as the 10th of *October*, and he had chartered the schooner *Good Hope* for that purpose, and the cargo must have been procured, and the voyage in full preparation on the 4th of *November*. By that time the defendants had advanced at least 40,000 dollars; and though the answers, with a want of precision that is very unusual in such a case, state that "at various times, during the period of one year," they advanced 47,000 dollars, yet it must all have been advanced between *October* and the 30th of *December*, 1818. We have seen that 40,000 dollars was due to them on the 4th of *November*, and we have no evidence that one cent was afterwards advanced. The reasonable inference is, that the whole advance was upon the credit of the property specified in the assignment of the 4th of *November*, and that the subsequent assignments of property of *doubtful title*, (for so the defendant *B.* must have regarded the mercantile adventure in question,) were taken under impression of the subsisting credit of *H.*, and for the purpose of adding further security to their former advances. There is no evidence, nor even an averment, that any advance was made on the credit of this return cargo, or on the strength of this assignment.

Are not these slight circumstances sufficient to protect the right and interest of the plaintiff in the return cargo, against that assignment? It was not a purchase by *G.* and *B.* in the ordinary course of commercial dealing, and the interest of *G.* and *B.* has no better pretensions, in this case, than that of the plaintiff, to protection. The defendant *B.*, admits, what may be deemed sufficient information of the plaintiff's right, at the time he took the last assignment, to have put him upon inquiry, and to charge both those partners with taking the assignment subject to those rights. He was acquainted with those circumstances, which

ought, in equity, and in fairness, to have led him to inquiry, and if he preferred to waive that inquiry, the assignment was taken *subject to the right of the plaintiff*. He says, that "he knew, or had reason to believe, that the plaintiff and *H.* had a running account between them, arising from mercantile adventures to *South America*, but whether the said adventures were partnership transactions between them, or whether the plaintiff acted merely as agent or factor for *H.*, and was to receive a certain fixed commission for his services, or whether, at the time the return cargo of the *Good Hope* was assigned to *G.* and *B.*, there was any thing due on the said account, or what interest the plaintiff had in the said return cargo, except in case the balance of the running account might be in his favour, the defendant did not know, nor was he informed." And if he knew that the plaintiff and the defendant *H.* had running accounts between them, arising *from mercantile adventures to South America*, and which alluded to the very voyage in question, and was uncertain whether the plaintiff and the defendant *H.* were partners, or what interest the plaintiff had in the return cargo, why did he not inquire? Was it not his duty to have inquired of *H.*, who could have told him that they were jointly and equally interested in that very cargo, which he was then laying hold of as *tabula in naufragio*, to secure his former advances? Was it dealing fairly with the rights of the plaintiff? Lord *Hardwicke* observed, in *Smith* v. *Low*, (1 *Atk.* 490.) that whatever was sufficient to put the party upon inquiry, was good notice in equity. And we have the familiar case in the books, (*Moore* v. *Bennett*, 2 *Ch. Cas.* 246.) where a purchaser shall be charged with knowledge of a fact, provided he cannot make out a title but by a deed which leads him to that fact, for it was *crassa negligentia* that he sought not after it, and this is in law a notice. Chancery, says Lord *Bacon*, looks to the conscience of a party, if he will traffick for what in equity he knows to belong to another. The defendant *B.* had here reason to know, or believe, that the

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return cargo belonged, in whole, or in part, to the plaintiff. He knew he was dealing for a subject in which the interest of the plaintiff was probably concerned, and that was sufficient to have prompted him to inquiry. He was bound, by the plainest principles of justice, to have called for explanations, and to have examined into the title of the plaintiff, before he took an assignment, for the purpose of excluding and barring his right. I have no hesitation in concluding, that the assignment in this case ought to be adjudged to have been taken, subject to the interest of the plaintiff, and the next and remaining inquiry is, as to the extent of that interest.

It was observed, upon the argument, that the plaintiff had held out to the world, the defendant *H.* as the real owner of this return cargo, and thereby enabled *H.* to practise a deception upon the public. If the defendants, *G.* and *B.*, could show that they had been the victims of this deception, they would have been entitled to have made the complaint. If the return cargo had arrived, and the letters of the plaintiff, and the invoice and bill of lading had been shown to these defendants, and trusting to them, they had made advances upon the credit of that cargo, to the defendant *H.*, they would have had a fair, equitable claim to protection. But the assignment, in this case, was taken a month before the return cargo had arrived, or the documents attending it had been seen, and they are not entitled to the benefit of any such defence. The defendant *H.* admits, that the return cargo was marked with his name, for the purpose stated in the bill, of protecting it from the depredations of the *Spanish* cruisers, hostile to the *Spanish* royalists, and he pretends only to a joint and equal interest with the plaintiff in that cargo.

If the plaintiff and *H.* were partners, then the interest of *H.* in that cargo, was his share in the surplus, subject to all partnership accounts, and the defendants, *G.* and *B.*, his assignees, are entitled only to this share, after a settlement of the accounts, and after all just claims of the plaintiff were

satisfied. (*Nicoll* v. *Mumford*, 4 *Johns. Ch. Rep.* 522.) As the defendants derive their title from *H.*, and as he has been extremely well disposed to promote their interest, in opposition to that of the plaintiffs, his admissions are good testimony against them, in respect to that title; and we are, at all events, to consider the plaintiff as jointly and equally concerned in the cargo. The only question now is, whether we are to consider him as a joint partner, as *H.* pretends, or as sole and exclusive owner of the entire return cargo, as he himself asserts. If the whole cargo belonged to him, then the assignment was the act of an agent or factor, pledging the goods of his principal for his own debt, and this the law will not permit. A factor may sell, out and out, in the way of business, and the sale will be binding; but he cannot pledge, even under the formality of a bill of parcels, and this was clearly such an act. It was an assignment to secure a debt, with a trust, to account for the surplus. It was, therefore, a mortgage, and not an absolute sale. It is an old settled and understood rule, that a factor cannot pledge, even though the creditor have no notice of his character as factor. In such a case, every creditor trusts and deals at his peril. (*Str.* 1178. 5 *Vesey*, 211.) No conclusion would appear more clear and inevitable, than that the plaintiff, in this case, is entitled, either as partner with *H.*, or as sole owner, to call the defendants *G.* and *B.* to account for the proceeds of the return cargo.

A factor cannot pledge the goods of his principal: He can only sell them, out and out, in the way of his business.

The evidence that the plaintiff was the sole owner of the return cargo, consists principally in the letters that passed between the plaintiff and *H.* It is evident, from the letters of the defendant *H.*, of the 5th of *June*, and of the 7th and 8th of *November*, 1818, that *Curriel* therein mentioned, was some assumed or fictitious name, and intended, the better to cover the property from depredation, to stand for the plaintiff. Then we have the declaration of the plaintiff, in his letter of the 20th of *December*, 1818, to *H.*, and which was produced on the part of the defendants, that *the greatest part of the return cargo was purchased with the money Mr. Cur-*

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riel sent me, or, in other words, with the plaintiff's own money. Here is, at least, sufficient ground for a reference to a master, to inquire and report what interest, if any, beyond or greater than a joint or equal interest, the plaintiff had in the return cargo, and to whatever extent that interest shall be duly ascertained, to that extent the defendants *G.* and *B.* must be decreed to account.

I shall, accordingly, declare, "that the defendants, *G.* and *B.*, took the assignment of the 26th of *December*, 1818, by way of security, and in trust, principally, if not entirely, for the purpose of securing the payment of advances antecedently made, and of debts antecedently incurred, and that the same was not a sale and purchase in the ordinary course of commercial dealing; and that the defendants, *G.* and *B.*, were, at the time they took the assignment, chargeable with sufficient notice of the rights of the plaintiff, to have put them upon inquiry as to the extent thereof, and to charge them with taking the assignment, subject to all the prior rights and equities of the plaintiff, and that as the plaintiff claims to have been the sole and entire owner of the return cargo in the assignment mentioned, and as the defendant *H.* admits the plaintiff to have been jointly and equally interested with him, and that it be referred to a master, to inquire and ascertain the extent and quantity of interest of the plaintiff, &c. and to report the amount, with the interest, if any, due thereon, together with the amount of the net proceeds of the return cargo, received by the defendants, *G.* and *B.*, with interest thereon; and that he call for papers, &c. and examine either of the parties, on oath, &c. and that the pleadings and exhibits in this cause, be received as proof before the master, together with such further proof as the parties may offer."

Decree accordingly.

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ROGERS and others, executors of HENDERSON, *against* BENSON and others.

A deed by husband and wife, of their joint estate, in trust to pay all the debts of the husband, and the residue to the use of the wife, and her heirs in fee, is a valid conveyance, as being founded on a valuable and meritorious consideration; and cannot be impeached by a subsequent purchaser without notice of the trust.

Where land is conveyed to husband and wife, they do not take as joint tenants, nor as tenants in common; but are both seized of the entirety; neither can sell without the consent of the other, and the survivor takes the whole; this case not being within the provision of the state relative to joint tenancies. (*sess. 9. ch. 12. s. 6.*)

The trustee in this case was held not to be responsible to the purchaser, on the ground of any misconduct, misrepresentation, or fraud.

June 6th and July 30th.

THE bill, filed *March* 28th, 1818, stated that *William Henderson*, the testator, died the 12th of *January*, 1812, having appointed the plaintiffs, his executors. That on the 5th of *December*, 1808, *William Houston*, to secure the payment of three thousand dollars, borrowed by him of *John Hunter*, executed his bond for that sum, payable in one year, and a mortgage to *J. H.*, on eight lots of ground in the city of *New-York*. That on the 1st of *December*, 1810, the principal of the said bond and mortgage being due, with interest, from the 5th of *December*, 1809, *J. H.* assigned the same to *W. Henderson*, the testator. That the assignment was duly acknowledged on the 12th of *January*, 1812, and registered on the 12th of *May* following, in the register's office in the city of *New-York*. That soon after the execution and delivery of the assignment, notice thereof was given to *W. Houston*, and the whole of the principal and large arrears of interest now remain due on the bond and mortgage to the plaintiffs, as executors of *W. Henderson*.

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That *William Houston* died intestate, on the 13th of *March*, 1813, and no person has administered on his estate. That the plaintiffs applied to *W. Houston*, before his death, for payment of the bond, who pretended, that previous to the execution of the mortgage, he had conveyed the premises to *Egbert Benson*, in trust. That the plaintiffs' on inquiry and search, discovered a deed recorded in the office of the clerk of the city of *New-York*, on the 21st of *June*, 1812, bearing date the 6th of *June*, 1805, from *W. Houston* and his wife, to *Egbert Benson*, in fee, of the mortgaged premises, together with other lands, upon certain trusts and conditions therein expressed; which deed the plaintiffs charged to be voluntary and without any consideration; and that *John Hunter*, at the time of the execution of the mortgage to him, was ignorant of the existence of that deed; and that *W. Houston*, from the date of the deed to the time of his death, continued, with the knowledge and consent of *Egbert Benson*, in possession of the premises, and received the rents and profits, and paid all the taxes and assessments thereon; and the plaintiffs submitted, that the deed was, therefore, so far as regarded the mortgage, void. That *Mary*, the wife of *W. Houston*, died before the execution of the mortgage, and her husband being then insane, administration on her estate was granted to the defendant, *E. Benson*. The bill prayed, that the money due on the mortgage be decreed to be paid, or that the premises be sold, and the money paid out of the proceeds.

The answer of the defendant, *E. Benson*, set forth the deed from *Houston* and his wife, to him, mentioned in the bill, by which they conveyed to him, the premises mortgaged, and another lot, afterwards reconveyed, in *trust*, to sell the whole, or as much as might be necessary to pay the debts then due or contracted by *W. Houston*; and as to the residue not sold, or retained to be sold, for the payment of the debts of *Houston*, the defendant, *E. B.*, might

make leases thereof, and pay over the rents to *Mary H.*, her heirs and assigns; and the said *Mary H.* was authorized, at any time, during her life, and if during coverture, with the consent of her husband, to revoke the trusts as to the whole or any part of the residue, after which revocation, the defendant *E. B.* should stand seized to the use of *Mary H.*, her heirs and assigns: and if *Mary H.* should not revoke such trusts, she might, whether covert or not, make a will, and upon her death, the defendant *E. B.* should stand seized to the uses of such will; and in case she should die intestate, then *E. B.* should stand seized to the use of her heirs at law: and it was agreed that *E. B.* as to the said residue, might, at any time during the life of himself and *Mary H* convey the same to her in fee, or to such person or persons as she might appoint as her trustee in the place of the defendant, *E. B* That the lots described in the said deed, being parcel of certain lots held by gift and grant from *Nicholas Bayard*, (father of *Mary H.*,) to *William H.* and his wife, and were so conveyed in trust to *E. B.* for the purpose of paying the debts of the said *W. Houstoun*, then remaining due and unpaid. That the defendant *E. B.* having accepted the trust, paid off the debts of the said *W. Houstoun*, mentioned and intended in the said deed of trust, with his own proper moneys, with moneys borrowed by the said *W. Houstoun*, for which the defendant joined as security, and with moneys furnished by the said *W. Houstoun*; and he claimed a balance due to him on that account. That in *October*, 1813, the defendant *E. B.* sold three of the trust lots to *A. H. Lawrence*. That on the 7th of *December*, 1818, *W. Houstoun* paid to the defendant, *E. B.*, one thousand dollars, on account; and from the coincidence of the dates of the loan by *J. Hunter*, and the said payment, he inferred, as highly probable, that the sum so paid to him by *W. Houstoun*, was part of the money borrowed of *J. Hunter*, but except such inference, the defendant was wholly ignorant how,

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or from whom, *W. Houstoun* obtained the said money: That on the 29th of *January*, 1810, *W. Houstoun* paid him, *E. B.*, two thousand dollars, which two sums were all the payments ever made to him by *W. Houstoun*. That on a settlement of their accounts on the 11th of *June*, 1811, a balance was found due from *W. Houstoun* to the defendant *E. B.*, which still remained due. The defendant, *E. B.*, admitted that the trust deed was without any other consideration than as above stated; and he denied that the same was ever, in any manner, kept secret and concealed. He stated, that the lots described in the trust deed were, and during the life time of *W. Houston*, continued to be, vacant and unoccupied, and he did not know whether any taxes or assessments had been paid on them. That *W. Houstoun* died intestate, and no person had administered on his estate. That soon after the executing of the trust deed, *Mary H.* went to *Georgia*, where she died, *August 7th*, 1806, during the life of her husband, leaving *Maria Houstoun* (since intermarried with the defendant *J. R. M.*) and *Elizabeth H.* her only issue, and who are the other defendants. The answer of the other defendants stated that *Nicholas Bayard*, on the 8th of *December*, 1797, in consideration of natural love and affection for his daughter *Mary*, the wife of *W. Houstoun*, conveyed to her and her husband, in fee, the one fifth part of all his real estate. That a partition was made between *W. H.* and his wife, and the other tenants in common of the real estate, and the lots mortgaged were conveyed in severalty to the said *W. H.* and his wife. The deed of partition was dated the 27th of *December*, 1804. That *Mary H.* never revoked the trusts contained in the deed to *E. B.*, in the residue of the lots, not sold or retained to be sold for the payment of the debts mentioned in the deed; and that *E. B.*, therefore, on the death of *M. H.* became seized of those lots to the use of the defendants *Maria* and *Elizabeth*, in fee: and they insisted that *William H.* had not, at the time the mortgage was ex-

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ecuted, any estate or interest in the premises; and that the trust deed was made for a good consideration, and ought to be upheld for the benefit of the defendants *Maria* and *Elizabeth*.

The plaintiffs, on the 1st of *November*, 1819, filed a *supplemental* bill, in which they charged that the defendant *E. B.*, at the time *John Hunter* lent the money to *W. Houstoun*, was informed or knew of the same; and that after the death of *Mary H.*, he, *E. B.* had frequent conversations with the person employed by *W. Houstoun* to negotiate the loan, and with the person employed by *J. Hunter* to examine the titles to the lots proposed to be mortgaged, in which conversation he, *E. B.*, gave no notice or intimation of the said trust deed; but, on the contrary, represented *W. Houstoun* to be seized of an absolute estate in fee in the premises mortgaged. That before the execution of the mortgage, *W. Houstoun* being desirous to sell the premises, obtained the written opinion of *E. B.* as to the nature of the estate of *W. H.*, dated *May* 14, 1808, in which it is set forth, that *W. H.* had then solely the entirety of the premises; and that at the time *W. Houstoun* was negotiating the loan of *J. Hunter*, that opinion was shown to his agent. The plaintiffs submitted, that, if the Court should be of opinion that the debt due to them, ought not to be satisfied out of the mortgaged premises, that then the defendant *E. B.* ought to be decreed to pay and satisfy the mortgage.

The defendant *E. B.*, in his answer to the supplemental bill, stated, that after the execution of the trust deed, it was discovered that there were a number of vacant lots belonging to the estate of *Nicholas Bayard*, which it was believed had never been aliened by him, and which consequently passed by his deed of gift above mentioned, and that as no person appeared to claim them, the co-donees agreed to make partition thereof between them; and a deed of partition, bearing date the 22d day of *July*, 1806, was ac-

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cordingly executed by them; (except the wife of *W. Houstoun*;) which partition was confirmed by an act of the legislature passed the 4th of *March*, 1808. That *W. Houstoun* afterwards, being desirous of disposing of the lots which fell to his share in that partition, consulted *T. A. Emmet*, and the defendant *E. B.*, as to the nature of his estate in those lots, and they gave him a written opinion, dated *May* 14th, 1808, which was set forth in the answer that it was not a *joint tenancy*, within the statute regulating conveyances by joint tenancy, &c., and that, consequently, on the death of *Mrs. Houstoun*, her husband became entitled to the *entirety*. The defendant *E. B* did not recollect, nor believe, that after giving that opinion, and before the loan by *J. Hunter*, he had any conversation with any person respecting it; and as to the other matters charged in the supplemental bill, he referred to his answer to the original bill.

June 6th. The cause, this day, came on to be heard on the pleadings and proofs.

T. A. Emmet, for the plaintiffs.

Boyd and *S. Jones*, for the defendants.

July 30th. The cause stood over for consideration to this day.

THE CHANCELLOR. 1. The children of *Mary Houstoun*, have a valid title to the mortgaged premises under the deed of trust of the 6th of *June*, 1805. That deed was founded on a valuable consideration, and there is nothing in the case to impeach its validity. It referred, by way of recital, to the deed of *Nicholas Bayard* to *William Houstoun* and *Mary* his wife, of the date of the 8th of *December*, 1797, for one equal undivided fifth part of his estate,

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and to the partition deed of the date of the 27th of *December*, 1804, in which the premises contained in the trust deed were released to *Houstoun* and his wife, in fee, by the other tenants in common. The conveyance, on its face, purported to be made in consideration of the trusts declared, and which were, that the defendant *Benson* should sell the whole or such parts as might be necessary, of the estate thereby conveyed to him, to pay the debts of *William Houstoun* then due or contracted, and to hold the residue of the estate, if any, in trust for the wife and her heirs, in the manner particularly described.

This, then, was a conveyance by the wife and her husband of their joint estate, for the meritorious purpose of paying his debts, and of settling the surplus upon her and her children. The husband and wife, in this case were not properly joint tenants or tenants in common, for they were but one person in law, and could not take by moieties. They were both seized of the entirety, and neither could sell without the consent of the other, and the survivor would take the whole. The same words of conveyance, which could make two other persons joints tenants, will make the husband and wife tenants of the entirety. This is a nice distinction laid down in the old books, and which has continued to be law to this day; and the special provision in our statute, that no estate in joint tenancy shall be held under any grant or conveyance, unless the premises were expressly declared to pass, not in tenancy in common, but in joint tenancy, does not reach this case, for the estate of the husband and wife is not a joint tenancy. (*Litt. s.* 291. 665. *Co. Litt.* 187. *b. Bro. Abr. tit. cui in vita, pl.* 8. *Back* v. *Andrew*, 2 *Vern.* 120. *Green* v. *King*, 2 *Black Rep.* 1211. *Jackson* v. *Stevens*, 16 *Johns. Rep.* 110.)

The case of *Ward* v. *Shallet*, (2 *Vesey*, 16.) is very much in point, in respect to the consideration and validity of this deed. The wife, in that case, had a contingent interest un-

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der a bond given by the husband on the marriage. She had also the lease of an office left her by her father's will. She agreed, in consideration of settling part of the money arising from the sale of the office, for her separate use, during her husband's life, and afterwards for her children, to part with her contingent interest in the bond. The husband became a bankrupt, and his assignees endeavoured, by bill, to subject her separate estate. But Lord *Hardwicke* held the settlement to be good, and the deed valid against creditors, for it had a sufficient consideration to support it, and this was her *parting with her contingent interest under the bond*, which may be a consideration as well as a certain interest. The consideration takes it out of the statute of *Eliz.* as to creditors, "to bring it within which, it must be proved, he was indebted *at the time of the conveyance*, and the contrary rather appears here." The bill was dismissed as far as it sought to impeach the deed. But Lord *Eldon*, in the case of *Lady Arundell* v. *Phipps* and *Taunton*, (10 *Vesey*, 139.) went further, and held that a purchase by a married woman from her husband, through the medium of trustees, for her separate use, might be sustained against creditors, if *bona fide*, and for a valuable consideration, *though the husband be indebted at the time.*

In the present case, the wife had a present vested interest, equal to that of her husband in the estate conveyed, and a contingent right to the whole, by survivorship; and she joined in a conveyance of the whole to pay all the debts of her husband, in consideration that the residue should be settled upon her in fee. The whole estate came to her from her father; and is it possible for a conveyance to be upheld by a more meritorious and valuable consideration? The conveyance is impeached, not by any then existing creditor, (for they were all provided for,) but by a creditor of the husband, for a debt accruing years afterwards, and after the death of the wife.

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There was no existing law, that required this trust deed to be put upon record; and there are no circumstances showing that the conveyance was intended to be a secret transaction. It was as notorious as any other ordinary family settlement, and it was known to Judge *Livingston*, in 1805. The subsequent mortgagee, therefore, took a mortgage, from the husband of the trust lands, at his peril, and under the same peril that any other purchaser buys. The mortgaged premises did not, at the time, belong to the husband, but to the infant children of his deceased wife; and their vested interest could not be affected by any act of their father; nor have the plaintiffs shown any right to come in as creditors under that trust deed.

2. There does not appear to be any well-founded pretence to charge the defendant *B.*, in his individual person, or property, with the payment of the mortgage debt or any part of it. He was not guilty of any fraud, by the opinion which he subscribed, as counsel, on the 14th of *May*, 1808. The opinion was intended to refer to the lands specified in the partition deed of the 22d of *July*, 1806, and referred to in the act of the 4th of *March*, 1808, confirming that partition, and those lands were only, as the act says, "parcel of the lands heretofore of the said *Nicholas Bayard*," and were not included in the trust deed. It is true, the case as stated and which preceded the opinion, was broad enough to include the trust property, and the opinion might seem to refer to the whole property derived to *Houstoun*, and his wife, from her father.

The general description, and the want of precision in marking the property to which the opinion was intended to apply, has probably led to this controversy, and to the attempt to charge the trustee with fraud. But the case affords no reasonable ground for any inference of fraud. It is impossible that the defendant could have seriously meant that *Houstoun* might lawfully traffic with the property then held by the defendant in trust for his children; and to

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suppose that he meant, by that opinion, to afford *Houstoun* the means to cheat, whenever he could find a suitable victim, would be most extravagant and groundless. The defendant had no motive for such an act of depravity; and the charge is repelled by the intrinsic circumstances of the case, as well as by the unimpeachable character of the party.

The defendant *B.* was not responsible for the misapplication, by *Houstoun*, of his opinion to fraudulent purposes. The statement of the case to which the opinion was annexed, was carelessly drawn, and left to be applied to property to which it was not intended. But this was the act of the defendant as counsel, and not as trustee, and it would be unjust to charge him, as trustee, because his opinion, given in the way of his profession, was fraudulently misapplied by *H.* about seven months after it was given, and without the knowledge or consent of the defendant. The charge could not, in any case, affect the vested rights of the children of Mrs. *Houstoun*; nor can I consent to make the defendant personally responsible, because I believe, from the intrinsic circumstances of the case, from the answer, from the want of connection in point of time and reference between the opinion and the loan, from the absence of proof, and from the character of the defendant, that no fraud was intended, and that the opinion had, in fact, reference to the twenty-one lots contained in the second partition deed, and not to those in the trust deed. The bill must, consequently, be dismissed without costs.

Decree accordingly.

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MINUSE and others *against* COX and others.

Where land was conveyed to the defendant, in trust to sell the same "at auction, or otherwise, in whole or in parcels, on giving three weeks notice thereof:" *Held*, that the direction, as to notice, applied only to a sale by public auction, and that the trustee having a discretion, a private sale by him, without any notice, was valid.

Where a trustee is directed to sell, on giving public notice, &c., a sale by him without such notice, will be valid, so as to confer a good title on the purchaser; but the trustee will be responsible for any deficiency in the price, below the real value of the land sold by him.

Where there is no unreasonable delay by a trustee, in applying the trust monies, according to the directions of the trust deed, and he does not apply the monies to his own use, he will not be chargeable with interest.

Objections to the admissibility of evidence before a master, not made the ground of exception on the report being filed, will be considered as waived, and cannot be raised at the final hearing.

Affidavits taken ex parte, after a cause has been set down for a final hearing, are inadmissible.

To give effect to a devise, the testator must not only be actually seised of the land devised at the time of making his will, but must continue so seised to the time of his death. A conveyance, therefore, by the testator, of the land devised, is so far a revocation of his will.

Although the plaintiff was entitled to file his bill for an account and distribution; yet where the charges of fraud, collusion and misconduct against the defendants, which formed the main ground of the suit, were proved to be false, unjust and vexatious, it was dismissed with costs, as to the defendants not liable to account, and the defendant who was accountable as trustee, was allowed all his taxable costs and extra charges and expenses out of the fund, before distribution.

May 30th and *July* 31st.

THE bill, filed *November* 28, 1818, stated, that the plaintiff *Catharine*, who married the plaintiff *John Minuse*, was the only daughter of *Alexander Fink*, deceased. Her father, by his will, dated *October* 18, 1816, gave to his

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daughter and his three sons, (defendants,) equally, all his personal estate, and to his daughter, a house and lot on the corner of *Grand* and *Second* streets, in the city of *New-York*, and another lot adjoining; and devised the residue of his real estate to his executors, in *trust*, to sell the same, and divide the same equally among his children, and made the defendants. *Jamieson Cox* and *David Grim*, his executors. On the 30th of *October*, 1816, *A. F.*, the testator, conveyed to the defendant, *Cox*, two houses and lots, No. 37, and 39, in *Chatham* street, a house and lot in *William* street, and three lots of land at the corner of *Grand* and *Second* streets, and a mortgage of *C.* and *T. Coles* dated *April* 26, 1816, for 2,000 dollars and all the bonds, notes, debts, and personal estate of *A. F.*, in trust, to take possession and receive the rents, and to pay thereout sufficient for the comfortable maintenance of *A. F.*, and to pay his debts, excepting those due to his children; and in case the rents and personal estate should not be sufficient, then in trust, after his death, to sell at auction or otherwise, in whole, or in parcels, on three weeks notice, the real estate, or so much thereof as may be adviseable and necessary, and out of the proceeds, to pay the costs and expenses, and the debts due by *A. F.*, and out of the residue to pay the debts due to his children; and the residue to divide among his children, according to his will. *A. F.* died *December* 11, 1816; and the deed to *Cox* was recorded *January* 10, 1817. The bill further stated, that the plaintiff *Catharine*, some months before his death, supported the testator, who was indebted to her, at his death, 850 dollars for moneys advanced to him and for his use; that the plaintiff *J. M.*, executed an assignment to the plaintiff *J. M.*, jun., reciting the will of *A. F.*, and that he was indebted to *J. M.*, jun., in 500 dollars, and assigned to him all his interest under the will, in *trust*, that *J. M.*, jun., should carry into effect the intentions of the will, as respected the plaintiff, *Catharine*. That *J. M.* was made a plaintiff for the sake of form only, having no interest in the suit. That the defendant *Cox*, under the deed of *trust*

to him, took possession of the property, and after the death of *A. F.* assumed solely the trust of executor. That *Cox*, combining with the other defendants to defraud the plaintiff *Catharine*, on the 1st of *May*, 1817, leased the lot in *William* street, to the defendant *Sparks*, for an inadequate rent of 400 dollars, when 500 dollars rent was offered and refused. That the defendant *Cox*, in collusion with the defendant *S.*, (a son in law of *A. F.*) and the defendant *A. F.* jun., in *March*, 1807, agreed to sell the lot in *William* street, for 6,500 dollars, when 8,000 dollars had been offered for it, and that without any notice of the sale, as required by the deed of trust. That the defendant *Cox*, collusively and corruptly agreed to pay certain pretended debts of the defendants *Philip Fink* and *John L. Fink*, who were to connive at the said sale, and which debts were accordingly paid.

The bill further charged, that the defendant *Cox*, in *September*, 1818, pretended to give public notice of sale of the two lots in *Chatham* street, and entered into a corrupt agreement with the defendant *R. Brown*, to allow him to become the purchaser; and the lots were accordingly struck off to him, at an inadequate price, and corruptly and fraudulently sold, on a tempestuous day, for 11,350 dollars, though some person interested under the will requested a postponement of the sale. That the lots were worth 16,000 dollars, and the defendant *C.* knew that other persons had offered that sum. That the defendant *B.* is the son in law of the defendant *C.* That the defendants *P. F.* and *A. F.* jun., corruptly agreed with the defendant *C.*, to allow the defendant *B.* to become the purchaser; and *C.*, in pursuance of such agreement, paid them their debts against the estate of the testator. That the defendants *C.* or *G.*, or one of them, possessed themselves of the personal estate of the testator, and applied the same to their own use, and refused to account. That in *December*, 1818, the defendant *C.* furnished an account of monies received

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and paid by him, which was false. The bill *prayed*, that the sales to *S.* and *B.* might be declared fraudulent and void, and the deeds be decreed to be delivered up and cancelled, and that the defendants be decreed to answer for the fair value of the lots so sold, or that they be re-sold, &c. That the plaintiffs *Catharine* and *J. M.* jun., may be quieted in the premises devised to the plaintiff *Catharine*, and that the defendant *C.* may be decreed to come to a fair account with the plaintiffs, touching the premises so conveyed to him, and to pay the plaintiffs what may be found due; and that the residue of the estate not specifically devised, be sold and distributed, according to the trusts; and for general relief.

The defendants put in separate answers; but it is not necessary to state them particularly. The defendant, *Cox*, in his answer, admitted the will of *A. F.* and the *trust deed* as set forth in the bill; and that *A. F.* was seized of the real estate described in the deed. He admitted that he took possession of the property mentioned in the trust deed, and received the rents and profits, of which he gave a full account, in a schedule. He admitted, that he was the sole acting executor; the defendant *G.* never having qualified or intermeddled with the estate. He answered every part of the bill, and fully denied every charge of fraud, collusion, or improper conduct. He denied that he had ever applied any part of the estate, or the proceeds thereof, to his own use, or had been in any manner benefitted thereby. He stated that he kept the monies of the estate distinct from his own, and deposited the balance due from him, on the first of *December* last, in the *Mechanics Bank*, where it still remained. The answer of the defendants *S.* and *B.* confirmed the statements made by the defendant *C.* as to the sale and disposition of the lots.

Witnesses were examined; and an order of reference to a Master was made, the 29th of *June*, 1820. The master's report, dated *October* 11th, 1820, was very full and special.

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Exceptions having been filed to the report, they were referred, by an order of the 17th of *November*, 1820, to the master to report thereon, and leave was given to either party to produce further proof before the master. The master made a report on the 6th of *March*, 1821. All the material facts admitted, or proved, or reported by the master, are sufficiently stated in the opinion of the Court.

May 30th. The cause was this day heard on the pleadings, proofs, &c.

A. Burr, for the plaintiffs.

Slosson, contra.

THE CHANCELLOR. 1. The allegation of fraud or breach of trust in the defendant *Cox*, in the sale at auction of the houses and lots, No. 37 and 39 in *Chatham* street, is without a shadow of foundation. It was a fair and regular sale on due public notice, at the coffee house in the city of *New-York*, and for a fair and full price, and in the presence of a respectable number of bidders. This is the opinion of the master, and this is my opinion, after a careful review of all the proofs. The pretence of its being a stormy day is destitute of any real solidity, when it is well known, that in the midst of a crowded and busy city, and in the very heart of its commerce, such a circumstance, unless in a very extreme case, never interrupts or disturbs the ordinary course of business. The reasoning and opinion of the master in his first report, of the 11th of *October*, 1820, seems to me to be conclusive. It is further to be observed, that the plaintiff *John Minuse*, the elder, and the two sons of the testator, *Alexander* and *John L. Fink*, were present at the sale, and made no objection, nor did they request any postponement. The only evidence of such a request is the testimony of *Peter Dewilt*, who says, that Mrs. *Minuse* made such a request on the morning of the auction

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sale to a person whom she saw, but whom he did not know to be the defendant *Cox*. This request being positively denied in the answer, that testimony is of no avail.

2. Nor is the charge of fraud or breach of trust, in espect to the renting, and in respect to the sale of the house and lot, No. 238 *William* street, better supported. It was prudently rented and prudently sold, and the whole charge going to impeach the motives and integrity of the trustee was equally untrue and unjust. The sale was for a full and fair price, and that decidedly appears from the weight of the testimony. Nor was there any irregularity or breach of trust in selling at private sale, without public notice. By the testator's will, of the date of the 18th of *October*. 1816, the testator devised the residue of his estate to his executors in fee, and in trust, "to sell and dispose of the same by public auction or private contract, as to them or him should seem expedient." The will left the mode and manner and time of sale entirely in the sound discretion of the executors, and gave no direction as to notice; and it is to be observed, that it is under the will that the plaintiff *Catharine* was entitled to claim, and did actually receive to herself, exclusively, the two lots on the corner of *Grand* and *Second* streets. The trust deed which followed after the making of the will, declared, that the testator was desirous that the residue of his estate "might be sold and disposed of, after his decease, among his children and next of kin, *according to the directions of his last will.*" It then conveys the whole real and personal estate to the defendant *Cox*, in fee, and in trust, to sell "by public auction, *or otherwise*, and together or by parcels, at his and their discretion, upon giving three weeks notice thereof, in one or more of the daily public newspapers to be published in the city of *New-York.*" The trustee, under this deed, as well as under the will, had a discretion to sell at public or private sale, and the direction to give *three weeks public notice in the daily*

Where a trustee is directed to sell the trust property, "at public auction or otherwise, in whole or in parcels, on giving three weeks notice," &c. the direction as to notice applies to a sale at public auction; and the trustee having a discretion, a private sale by him, is valid.

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papers, evidently alluded to sales at auction, and not private sales. The direction was to give three weeks notice *thereof*, that is, of the auction. To give three weeks notice of a private sale would be absurd; and it would be equally so to suppose the testator, when he gave to his trustee a discretion to sell at auction *or otherwise*, that he meant to debar him from accepting of an advantageous offer, because there had not been three weeks notice of the time of accepting it These words must be construed according to the reason of the thing, and the usages of business applicable to the case; and there can be no possible doubt of the intention of the deed, that the notice should be applied to the auction sales, and not to any other.

But if the direction as to notice, did apply to both a public and a private sale, a sale, without notice, would be valid, so as to confer a good title, on the purchaser; but the trustee would be responsible for any deficiency of the price below the real value of the land.

But if that notice did apply to all and every sale, public and private, I should concur in opinion with the master, that the sale without the notice would be valid, and confer a good title on the purchaser; and that the only consequence would be, that the trustee might be responsible for any deficiency in the price, for which it sold, below the real value of the land. But he reports that in this case, the house and lot sold for a full and fair price, and probably for as much or more than it would have fetched at auction. It appears further in proof, that the private sale was at the request of the plaintiff *John Minuse*, the elder, and of the defendant *Alexander Fink*.

3. Another charge of fraud and breach of trust in the defendant *Cox*, is that he paid the debts of *Alexander* and *Philip Fink*, against the estate of the testator.

Those debts had been liquidated and acknowledged by the testator himself, under his own hand. The acknowledgment was proved by the plaintiffs, the elder and the younger *Minuse*; and the account of *Alexander Fink*, in particular, the testator acknowledged and signed at the request of the elder *Minuse*. One of the witnesses heard both *John Minuse* and his wife declare, on the very day the testator settled

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these accounts with his two sons, that they were *satisfied*, and glad it was settled. The weight of proof was also very decidedly in favour of the competency of the testator, not only to make a will, (in which the plaintiffs acquiesce, for the plaintiff *Catharine* takes under it a specific devise,) but to decide on, admit and acknowledge the demands of his two sons. After such settlements, and with such approbation, was it for the defendant *Cox* to contest them, and throw a brand of discord into the heart of that family? There is no colour for the accusation of a breach of trust on this ground.

4. Another charge is, that the defendant *Cox* paid a debt of *John W. Tuthill* against the estate; but the master reports the proof, and it was amply sufficient to support the charge, and justify the payment.

Where there is no unreasonable delay by a trustee in applying the trust monies according to the directions of the trust deed, and he does not apply it to his own use, he is not chargeable with interest.

5. The counsel for the plaintiffs have objected to the master's report, because he had not charged the defendant *Cox* with interest on the trust monies which had from time to time come to his hands. But the master observed that there was no unreasonable delay of the defendant *C.* in the payment of debts, nor any evidence that any of the monies had been applied to his use. It further appears, that the testator died in *December*, 1816, and the trust deed is dated the 20th of *October*, 1816; and by the 1st of *December*, 1817, the trustee had paid towards debts, and necessary disbursements, 16,568 dollars and 35 cents, and had deposited the balance in bank, on the 1st of *December*, 1817. There was no proof of any culpable negligence in the case; and the master would have done injustice to the defendant *C.*, if he had charged him with interest. This Court is as solicitous to protect a faithful, as it is to punish a faithless trustee.

6. The counsel for the plaintiffs have made an objection to the admission by the master of parol proof before him, as not within the order of reference of the 29th of *June*, 1820. But as far as parol proof was admitted

under that order, it did not form a ground of objection to the report of the 11th of *October*, 1820, made under that order, nor was it one of the five objections taken. It was therefore waived, and cannot be raised at the final hearing. This is a clear and decisive answer to the objection; and as far as parol proof was admitted by the master, under the second order of reference of the 17th of *November*, 1820, it is sufficient to observe, that the order expressly declared, that "either party might give further proof before him, as to the points so excepted to." And it is worthy of notice, on this point, that the order of the 17th of *November* confirmed the report in all points not excepted to, and the exception now referred to was not taken until the coming in of the second report in the following *March*.

There was another objection to the second report, that the master had not stated accurately one or two facts in relation to the testimony, but the circumstances referred to were so immaterial, as to the merits of the case, whether they were correct or not, that I have not thought it worth while to take further notice of them.

7. The counsel for the plaintiff offered at the hearing, the affidavits of *John Puntzius*, and *John Minuse*, the plaintiff, taken on the 26th of *May*, 1821, *ex parte*, and after the cause was set down for final hearing, and upwards of two months after the coming in of the second report, and the exception taken thereto. This was an irregularity, and an abuse of the privilege of taking testimony, too glaring to suffer me to pause for a moment, in declaring them to be irregular and inadmissible.

8. The master has mentioned in his first report, that it was shown to his satisfaction, that the plaintiff, *John Minuse*, had a demand against the testator's estate for 752 dollars and 82 cents, including the boarding, lodging and necessaries furnished the testator by *Minuse* and his wife. In respect to this debt, it is to be observed, that the bill does not embrace it. It is declared that the plaintiff, *John*

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Minuse, the elder, is made a party for form only, and that he has no interest in the suit; and the bill states, that the elder *Minuse* had assigned to the younger *Minuse*, all his right and interest *under the will* of the said testator. The debt, therefore, due to the elder *Minuse*, was not included in the deed of assignment for it was not a right or interest derived under the will or deed of trust of the testator. In respect to that debt, the elder *Minuse* stands as a creditor, and disclaims to sue in that character in this suit. The answer says, he has sued at law for his demand, and that the suit was then at issue, and we have no concern with that demand in this suit.

To give effect to a devise, the testator must continue to be seised of the land devised to the time of his death.

9. The whole ground of the bill has failed; and the highly inflamed and most injurious charges of fraud, corruption, and abuse of trust, were without the least shadow of foundation in truth or justice. There is no proof that even the conveyance of the two lots given to the plaintiff *Catharine*, by the will of her father, had ever been demanded of the trustee; and as these lots, as well as the rest of the estate, had been conveyed to the defendant by deed, executed subsequent to the will, it was so far a revocation of the devise. It was a subsequent alteration of the estate by the act of the testator himself, and the testator was no longer seised after the conveyance in trust; and to give effect to a devise, the devisor must not only be actually seised at the time he makes his will, but he must continue to be seised of the land devised at the time of his death. (*Bro. Abr. tit. Devise*, pl. 15. 1 *Rol. Abr.* 615. and pl. 6, and 2. pl. 1.) The title of the plaintiff *C.* to these two lots rested on the trust deed, and not on the will; and the defendant *C.* had a right to retain the same a reasonable time, to see if the sale and proceeds of them might not be wanting to satisfy debts. There was no default on the part of the defendant *C.*, in not re-conveying these lots to the plaintiff *C.*, at the commencement of this suit, that would render

him deserving of blame. There should at least have been a formal demand upon him, for the release of those specific lots, to put him in the wrong; and it appears now to be admitted by the counsel for the plaintiff, that at the time of the first reference in the cause, in *June*, 1820, to have an account of the estate taken and stated, the defendant *C.* agreed and had since released to the plaintiff *C.*, the two lots devised to her by the will. The two references to the master, and all the litigation accompanying it, were therefore confined to the charge of fraud and abuse, which have been already considered. If the bill had simply been to call for an account and distribution, there would have been no real ground to complain. What then remains for the defendant *Cox* to do? It is to sell at auction the remaining lot unsold, and to retain out of the proceeds of that lot, and of the surplus monies in hand, sufficient to meet the demand at law of the plaintiff *John Minuse*, and to distribute the residue, after all the charges of this suit are deducted, among all the children of the testator in rateable proportions. And considering the great vexation, and injustice and falsehood, of the charges forming the main ground of this suit, I shall direct: 1. That the bill as to all the defendants, except the defendant *Cox*, be dismissed, with costs to be paid by the plaintiffs. 2. That the defendant *Cox* recover his taxable costs of this suit, and charge the same upon the surplus fund coming to the plaintiffs, or to one of them, and that he charge all his other *extra* expenses and charges of this suit, that were just and necessary, on the fund at large, before any division and distribution thereof. 3. That the lot remaining unsold, be sold in a reasonable time, by the defendant *Cox*, at auction, on giving three weeks notice, and that out of the proceeds thereof, and of the monies in hand, he retain sufficient to meet any demand at law of the plaintiff *John Minuse*, against the estate of the testator, and any other just demand now existing; and that he distribute the residue, equally and rateably, among

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the children of the testator, after having previously deducted his *extra* expenses and charges justly incurred in this suit, from the fund at large, and his taxable costs of this suit out of the share or proportion of such surplus coming to the plaintiff *Catharine*, or to such of the plaintiffs as may lawfully represent her. And the plaintiffs are to be at liberty, at any time hereafter, to apply to this Court, by petition or due notice, on the foot of this decree, to compel a performance of the same on the part of the defendant *Cox*, as to such sale and distribution, according to the directions aforesaid.

Decree accordingly.

TITUS *against* NEILSON and others.

The Courts of law having decided, that a mortgagor in possession of land mortgaged in fee, before foreclosure or entry by the mortgagee, has (in regard to all the rest of the world, except the mortgagee) the legal seisin, and that his equity of redemption might be sold on execution; and that in case of his death, while in possession, and before foreclosure, his widow was entitled to her dower in the land mortgaged, of which she could not be deprived by a purchaser of the equity of redemption of her husband; this Court will follow the doctrine of the Courts of law, and allow the widow her dower out of the proceeds of the sale of the mortgaged premises, on a bill for a foreclosure and sale.

As where the wife of a mortgagor joined in a mortgage in fee; and the mortgagor, afterwards, executed a second mortgage, in which the wife refused to join; and after a decree for sale, on a bill filed by the first mortgagee, but before sale, the mortgagor died; held, that his widow was entitled to her dower out of the surplus proceeds remaining after the first mortgage debt was satisfied.

August 2d.

THE petition of *Catherine Neilson* was presented, claiming dower out of the proceeds of the sale of an equity of redemption, in certain mortgaged premises.

It appeared from the petition, that her husband *William Neilson*, during the coverture, executed a mortgage to the plaintiff, *William Titus*, in fee, to secure the payment of 10,000 dollars, and that she joined in the mortgage, and duly executed and acknowledged it. Her husband, afterwards, gave another mortgage upon the same land, to the defendant *Coles*, to secure the payment of a sum of money to him; but she did not join in this mortgage. *Titus* filed a bill to foreclose his mortgage, and made *Neilson* and his wife, and *Coles*, the second mortgagee, parties. The petitioner, in her answer, admitted all the facts, and prayed that her rights might be protected and preserved; and the defendant *Coles*, in his answer, claimed to be paid his debt out of the proceeds of the mortgaged premises, next after the payment of the monies due on the plaintiff's mortgage. On the 6th of *November*, 1820, the cause was brought to a final hearing, and the mortgaged premises decreed to be sold, and the proceeds of the sale to be brought into Court, and the debt and costs due to the plantiff *Titus* first to be paid, and after certain other costs were deducted, that then two third parts of the residue of the proceeds be paid to *Coles*, the second mortgagee, and that the other third part of the residue "abide the further order of the Court." On the 26th of *November*, and before the sale, *William Neilson*, the mortgagor, died. The sale took place according to the decree, and the defendant *Coles* became the purchaser, and after the payments directed by the decree to be made, 2,281 dollars, being one third part of the net surplus, was retained in Court, subject to the question raised by the petition, whether the widow of *Neilson* was entitled to dower in the equity of redemption. She prayed that the said sum might be invested in productive stock, and the interest or income thereof paid to her, during life.

The prayer of the petitioner was resisted by the defendant *Coles*, who claimed the whole of the surplus proceeds towards satisfaction of his mortgage, and he denied that

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the widow was entitled to dower in the equity of redemption.

B. Robinson, for the petitioner. He cited 7 *Johns. Rep.* 278. 15 *Johns. Rep.* 321. 1 *Caines Ca. in Er.* 47. 4 *Johns. Rep.* 41. 6 *Johns. Rep.* 295. 1 *Johns. Ch. Rep.* 45. 55, 56.

P. W. Radcliff, contra. He cited *Prec. Ch.* 65. 97. 336. 10 *Ves.* 263. 1 *Bl. Com.* 445, notes. *Cruise's Dig.* tit. 12. *Trust*, ch. 2. sec. 12. 2 *P. Wm.* 700. *Ca. temp. Talbot*, 138. 2 *Atk.* 525. 3 *P. Wm.* 229. 2 *P. Wm.* 719. note. 1 *Bro. C. C.* 328. 1 *Pow. on Mortg.* 35. 2 *Bl. Com.* 132. 1 *Cruise's Dig.* tit. 15. ch. 3. sec. 9. 6 *Johns. Rep.* 290. 7 *Johns. Rep.* 278. *Prec. in Chan.* 137.

THE CHANCELLOR. The claim of the widow must be admitted, according to a series of decisions in the Courts of this State. In *England*, dower is considered as a mere legal right, and equity follows the law, and will not create the right where it does not subsist at law. It is on this principle, according to Lord *Redesdale*, (2 *Sch.* and *Lef.* 388.) that a Court of Equity will not allow dower of an equity of redemption reserved upon a mortgage in fee, though there may be dower of an equity of redemption upon a mortgage for a term of years, because in that case, the law gives dower, subject to the term. The justice, however, of allowing dower of an equitable estate, seems to have been very generally felt and acknowledged in the *English* Courts of Equity. But we have nothing to do, at present, with the *English* adjudications on the subject, for as our Courts of law do now allow dower, in certain cases, of an equity of redemption, this Court, according to the doctrine referred to, ought to follow the law, and also allow dower out of the proceeds of the equity of redemp-

tion, and which proceeds have in this case been placed before the Court.

In *Waters* v. *Stewart*, (1 *Caines Cases in Error*, 47.) in which the decree of this Court was, in 1804, unanimously affirmed in the Court of Errors, it was established, that an equity of redemption reserved upon a mortgage in fee, might be sold on execution at law against the mortgagor, as *real estate*, so long as the mortgagor was in possession, and there had not been a foreclosure of the mortgage. The purchaser would take as the mortgagor held, subject to the lien and rights of the mortgagee. According to this decision, the mortgagor was regarded as seised at law, before foreclosure or entry by the mortgagee. In pursuance of this decision, it was decided by the Supreme Court, in 1809, in *Jackson* v. *Willard*, (4 *Johns. Rep.* 41.) that the interest of the mortgagee in the mortgaged premises, before foreclosure or entry by him, was not the subject of sale on execution at law as real estate. The one decision was a necessary consequence of the doctrine in the other. This doctrine was first applied in the case of *Hitchcock* v. *Harrington*, in 1810, (6 *Johns. Rep.* 290.) to the case of dower. The mortgagor died in possession after the debt became due, and before foreclosure; and he was held to have died seised, in respect to the dower of his wife, and that she was entitled to dower, as against a purchaser holding under the heir. But in that case, the mortgage was no longer subsisting, and had been paid off and satisfied by the purchaser; and the case is only worthy of notice in this review, for the recognition which it contains of the doctrine, that the mortgagor, in respect to all the world but the mortgagee, continued seised in law, so long as the mortgagee had not exerted his right of entry or foreclosure under his mortgage, and that such a seisin was sufficient for the wife's dower. The case of *Collins* v. *Torry*, (7 *Johns. Rep.* 278.) went a step further, and held that the estate of the mortgagor was the real estate at law, and that the widow of a person purchasing

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of the mortgagor, *subsequent to the mortgage*, might recover her dower, against a *purchaser* under the husband, who could not set up the mortgage, even as a subsisting title, there having been no entry or foreclosure under it. In that case, however, the mortgage was not considered as any longer a subsisting title: but in respect to the general doctrine, that the mortgagor, before entry or foreclosure, was seised, and that no purchaser of the equity could set it up in bar of dower, the Court go on and observe, that it did, "in effect, enable the wife to be endowed of an equity of redemption, and under the above limitations, it was just, and consistent with principle, that she should be endowed of it. We cannot now, (alluding to the above decisions,) with any justice or consistency, say, that the interest of the mortgagor is the real estate at law, and yet that it is not such an estate, when the mortgagor's widow comes to ask her dower of the heir or grantee of her husband. The plain and necessary rule is, to allow her the dower, which she must take, as the heir or purchaser takes the estate, subject to the mortgage."

It is to be observed, that the mortgage, in that case, was given by a person from whom the husband purchased, and therefore, the interest of the wife, as well as of the husband, subsequently acquired, might have been held subject to the mortgage. It could not have been intended, by any observations in the case, that if the husband, during coverture, and while seized of the equity of redemption, should mortgage that equity, that the right of dower of the wife could be affected by *that* mortgage any more than by an absolute sale of the equity.

The case of *Coles* v. *Coles*, 15 *Johns. Rep.* 319.) went a step still further, and held, that where a person seised of land in fee, mortgages it, and afterwards marries, his widow was entitled to dower out of that equity of redemption, against the purchaser of that equity, though the mortgage

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was still subsisting. Here was a final and full establishment in our Courts of law of the principle not admitted in the *English* Courts of law, that a wife could be endowed of an equity of redemption arising upon a mortgage in fee, and this Court ought to follow the rule of law. It ought to do so, according to the rule and practice of the Courts of Equity in *England*, in the like case, and because the doctrine recognizing the legal title of the mortgagor before foreclosure, first originated in this Court, and was confirmed in the Court of Appeals, and, finally, because, it is a most just and reasonable doctrine, and has been so acknowledged throughout the history of the cases.

When *Coles* took his second mortgage, he took it as a purchaser would have taken the equity, subject to the right of dower of the wife; and if he did not deem the security sufficient, under that condition, he should, as the first mortgagee did, have procured a release of her right. When the wife joined in the first mortgage, she only parted with her right of dower to the extent of that mortgage debt, and she would have been entitled to have redeemed the mortgage, upon her husband's death, for the sake of her dower, and to reinstate herself in all her rights. If she consents to a sale under the first mortgage, it is with a reservation of her rights; and if the right of dower be consummated by the husband's death, before the sale, (for it is clear, that she would have had no claim upon the proceeds, after the satisfaction of the first mortgage, if her husband had been living,) she has a good right in equity to have her dower satisfied out of the surplus proceeds, which represent the equity of redemption. Suppose the land could properly have been sold in parcels, and the direction in the decree had been to have sold only one parcel of the mortgaged premises, sufficient to have satisfied the first mortgage, she would have been most clearly entitled to her dower in the residue of the land, in preference

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to the claims of the second mortgagee; and then, according to the doctrine on the part of *Coles*, the second mortgagee, her right must depend upon a circumstance resting so entirely in discretion, as the mode to be adopted for satisfying the mortgage sought to be foreclosed by the bill. Her right must be of a more fixed and stable character.

In *Tabele* v. *Tabele*, (1 *Johns. Ch. Rep.* 45.) there was no question raised, or opposite interests set up, but it seemed to be assumed, as the course of the Court in such cases, to allow to the widow her dower out of the surplus proceeds of the mortgaged premises, after satisfying the mortgage in which she had joined. I do not perceive what right a subsequent mortgagee of the husband's equity, has to that equity or its proceeds, in a case in which the wife was no party to the mortgage, which any subsequent purchaser or other lawful representative of the husband, would not equally have.

I shall accordingly grant the prayer of the petition, by directing, that the sum of 2,281 dollars, be invested in government stock, and the income thereof, as it may be received from time to time, be paid to the petitioner during her natural life, and that the principal, after her death, and the income thereafter accruing, remain subject to the further order of the Court. Her claim to costs against him is denied.

Order accordingly.

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COOPER v. REMSEN.

E. COOPER *against* REMSEN and others.

A testator, by his will, gave to the plaintiff, his daughter, "during her separation from W, C., her husband, one thousand dollars a year," which he charged on his real estate; and the daughter was, in fact, living separate from her husband when the will was executed; but they, afterwards, lived together, and were living and cohabiting together, at the time of the testator's death; and, about three months after his death, they again separated and continued to live separate for a year: *Held*, that the legacy depending on a separation which existed at the time of the execution of the will, between the legatee and her husband, and with a view to that fact, the condition annexed was lawful and proper; and the separation having ceased, when the will took effect by the death of the testator, there was an end to the legacy; and a voluntary separation of the plaintiff and her husband, after the death of the testator, would not entitle her to it.

THE bill stated, that the plaintiff was the widow of *W. Cooper*, deceased, and daughter of *Isaac Clason*, deceased. That on the 26th of *September*, 1810, *I. C.* made his will, to which he added a codicil, dated *February* 14, 1815, a short time before his death, by which he appointed two additional executors. The defendants, *Remsen*, *Dickinson*, and *Delaplaine*, were the executors. The will contained the following clause: "I give and devise to my daughter *Eliza Cooper*, her heirs and assigns, for ever, all the furniture which she has received from me, amounting to 3,570 dollars and 23 cents, and which now stands in my books against her, and in full satisfaction of all further provision out of my estate. I do give and bequeath to her, during her separation from *William Cooper*, her present husband, one thousand dollars a year, which sum is hereby charged upon my real estate, and shall be paid by the other children, in proportion to their income arising out of

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their portions of the real estate: and I do hereby declare it to be my intention, that neither my said daughter *Eliza Cooper*, nor any of her children, by the said *William Cooper*, shall inherit any part or portion of the real estate hereafter devised, or the rents, issues or profits thereof, as heirs, or heirs to any of my other children, nor shall she, nor any of her said children, be considered or adjudged as the legal representative, or representatives, of any of my other children, so as to be entitled to recover any portion of my real or personal estate, except that which I have hereby expressly given to her." On the 26th of *September*, 1810, and before that time, the plaintiff and her husband *W. C.* lived separate and apart, and she then resided with her father. This separation continued for eight or ten months, when they again lived and cohabited together. The bill further stated, that a disagreement existed between the plaintiff's husband and her father, at the time the will was made, and which continued to his death. That shortly after her father's death, she was constrained by her husband to live separate and apart from him, and so continued to live separate, for more than a year. That the separation was not induced by any desire on the part of the plaintiff to obtain the legacy given to her by her father's will; and she was at the time of the separation, ignorant of the contents of the will. That the separation was compulsory and against the will of the plaintiff. That the real estate was more than sufficient to pay all the debts, and the legacy, &c. That her husband *W. C.* was unable to maintain her, and died intestate, *November* 1, 1819; and his property was not sufficient to pay his debts. That she has three children by *W. C.*, who are infants, and they are destitute of the means of support. That she had offered to the executors and heirs of *I. C.*, security to refund, in case of a deficiency of assets. That her sisters *J.* and *E.*, had satisfied her, as to that part of the legacy chargeable on their portions of the real estate. She

prayed that the defendants might be decreed to pay to her, the arrears of the annuity, given by her father's will, with interest, and for general relief.

The *answers* admitted most of the facts charged in the bill. That the plaintiff and her husband lived apart when the testator, *I. C.*, made his will, but were living together when the codicil was made, which fact was known to the testator. It was proved, that about three months after the death of the testator, the plaintiff and her husband separated, and continued to live separate for a year.

H. Sedgwick, for the plaintiff.

B. Robinson, contra.

THE CHANCELLOR. I have had occasion already to express my opinion, on the condition annexed to the legacy to the plaintiff. (3 *Johns. Ch. Rep.* 382. 522.) The testator intended to make the provision for the plaintiff, during her separation from her husband, and that separation actually existed at the date of the will. He only intended it to continue "during the separation;" and at the time of his death there was no separation, but the plaintiff and her husband lived and cohabited together, as husband and wife. The testator had a right to judge for himself, whether any, and what provision he would make by will for the plaintiff, and he determined to give her the furniture she had received, absolutely; but he expressly, and in very clear and determinate language, excluded her from any share of his estate, except the annuity in question, upon the condition expressed. The Court cannot make a will for the testator, but it is bound to support the will as it is made, if the condition is not void by being impossible, or *contra bonos mores*. There is a wide difference between a bequest to a daughter during her separation from her husband, when the separation

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was then actually existing, without being procured by the testator, and a legacy to her, *if she lived apart from her husband;* for that would be to hold out a temptation to a separation, which would be *contra bonos mores.* The legacy would be simple and pure in the latter case, according to the decision of Lord *Northington*, in *Brown* v. *Peck;* (1 *Eden.* 140.) but in the former case, the legacy depends upon the fact of separation then already commenced, and was, in that event, a kind and charitable provision.

The condition annexed to the legacy being, in this case, lawful, the plaintiff must bring herself within its terms, to entitle her to the annuity; and she has failed on this point of fact. She and her husband lived together at the time of the testator's death; and they separated in three months after *his* death, and continued separate for one year. I am to presume that they then came together and cohabited until her husband's death, which was upwards of four years after the death of her father. The separation of her and her husband *by his death*, was not the separation alluded to or intended by the will. The testator evidently referred to a separation in the life time of the husband; and he only intended to make a provision for her during that interval, for he declares, that he gives her the furniture, "in full satisfaction of all further provision out of his estate." The question, then, is, whether the plaintiff was entitled to the annuity during the separation of a year subsequent to the testator's death? I have already observed, when the suit was before me for the annuity, which was brought in the life time of the husband, that a *voluntary* separation of the plaintiff and her husband, after the testator's death, would not entitle her to the legacy. She must show, at least, an involuntary separation, coereed and rendered necessary, by the acts, or by the desertion of the husband. We have no such proof in this case. We have only proof, by one witness, of the real fact of separation for one year, and that is not sufficient. The plaintiff may

have voluntarily renounced her conjugal duties. She avers in the bill, that the separation was against her will; but the defendants do not admit it, in their answers, and she furnishes no proof of the manner and cause of the separation. She was bound to make out her case, especially as it had been declared, when her case was formerly before the Court, that an involuntary separation on her part was indispensable to be shown.

I incline to think, that, if the subsequent separation had been involuntary, it would not have satisfied the will. The testator must have made the will in reference to the actual separation existing at the time he made it, and the separation must have been subsisting at his death, when the will took effect, to bring the plaintiff within its terms. If he had made the will in reference to a separation, to take place *after his death*, it would have been a provision contrary to good morals, and good policy, because, it would be holding out a temptation to the parties to separate, by private agreement, for the very purpose of acquiring the annuity. And it would be extremely dangerous, to allow the wife to set up a separation, subsequent to her father's death, and to claim a benefit from it. Such a claim is liable to great abuse, and ought to be viewed with extreme suspicion. If the condition be valid, as I think it was, for the reasons already mentioned, then the condition must have been fulfilled at the testator's death; and a subsequent fulfilment of it, is inadmissible on every principle of sound policy.

Bill dismissed, without costs.

1821.

KENNY v. UDALL.

E. S. KENNY *against* UDALL and KENNY.

The equitable right of the wife to personal property in the hands of her trustees, cannot be disposed of by the husband, without making a suitable provision for her support.

The wife's equity, as it is called, attaches upon her personal property, whenever it is subject to the jurisdiction of the Court, and is the object of a suit, into whose ever hands it may have come, or in whatever manner it may have been transferred: and it makes no difference, whether the application to the Court be by the husband, or his representatives or assignees, in order to obtain possession of the property, or whether it be by the wife or her trustee, seeking a provision out of the property. And this equity is equally binding, whether the transfer of the property be by operation of law, or by the act of the party to general assignees, or to an individual, or whether the particular transfer was voluntary, or made upon a good and valuable consideration. And the Court may, in its discretion, give the whole, or part only of the property, to the wife, according to the circumstances of the case.

Where the husband lives with his wife, and maintains her, and has not misbehaved, the course is to allow him to receive the interest and dividends on her property.

As, where Bank stock, settled by a father on his infant daughter, placed in the hands of the assistant register of this Court, as trustee, to execute the trusts in her favour, declared by the deed of settlement, was, within one year after her marriage, and while she was an infant, sold and transferred by her husband and her, for a valuable consideration, the assignee knowing, at the same time, of the deed of settlement and the infancy of the wife, the assignment, on a bill filed by the wife against her husband and his assignee, was declared to be null and void, so far as respected the wife's equity; and the husband having misbehaved himself, the dividends were directed to be paid to the wife herself, until she came of age: with liberty for her then to apply for such suitable provision out of the property as might be determined, on the usual reference to a master.

June 2d, and *August* 10th.

THE plaintiff, the wife of the defendant *Edward M. L. Kenny*, being an infant, and permitted to sue in *forma*

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pauperis, by *E. Elmendorf*, her next friend, filed her bill the 11th of *November*, 1820, against the defendants. She was the daughter of *Thomas Hewitt*, late of *Cheshire*, in *England*, deceased, who removed to *New-York* about the year 1810, and died here, the 12th of *October*, 1814, possessed of considerable property. The plaintiff was born in *Cheshire*, the 9th of *November*, 1801. Her father owned 310 shares of stock in the *Bank of America*; and on the 1st of *June*, 1814, executed a deed of settlement, by which he transferred those shares to the *President, Directors and Company of the Bank of America, in trust*, for the following uses: 1. To pay the bank what he owed them; and then to pay him all dividends on the stock, and to retransfer it, when requested by him in writing: 2. To dispose of sufficient of the stock, to carry into effect the trusts therein after expressed, and to defray the expense of executing them, and also to pay one thousand dollars to his wife, as soon as she might want it, after his decease: 3. To pay his son *Thomas*, 4,000 dollars, as soon after his decease as they might think proper: 4. To pay his daughter *Eliza* (the plaintiff) the dividends on *eight thousand* dollars of the stock, as the same should accrue, for her education, which was to be under the care of her mother, and to transfer the principal to her, (the plaintiff,) at the age of twenty-one years; and should she die before twenty-one, and without issue, the principal to go to his son *Thomas*, &c. stating other trusts. After the death of *T. Hewitt*, his widow, the mother of the plaintiff, obtained letters of administration upon his estate, and was appointed guardian of the plaintiff. The mother died on the 9th of *October*, 1819. Previous to her death, on petition to this Court, *Isaac L. Kip*, the assistant register, was appointed trustee, to receive the dividends on the 8,000 dollars, and to pay the same over to the mother of the plaintiff, for her education, whereby she became a ward of this Court. On the 19th of *January*, 1818, she married with the defendant *K.*, without

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the consent of her mother, being then about sixteen, and at a boarding school. On the 9th of *February* following, upon the petition of her husband, for an immediate transfer of the stock, or a power to receive the dividends, an order was granted that *Mr. Kip*, the trustee, should pay to the defendant *K.* the dividends on the 8,000 dollars, but to continue to hold the principal, in trust, until further order. The bill stated further, that the defendant *K.*, before, or soon after his marriage with the plaintiff, became embarrassed in his circumstances, and with a view to relieve himself, by raising money on the stock, through the agency of *Ezra L. Ingraham*, since deceased, who offered to assist him, negotiated a contract with the defendant, *Richard Udall*, by which it was agreed, that *U.* should pay *K.* 5,000 dollars cash for the stock, and that *K.* and his wife should make an absolute assignment and transfer of the stock to *U.* That during the negotiation, *U.* investigated the title of *K.* and his wife to the stock, and was informed of the terms of the settlement of the stock on the plaintiff by her father. The bill then stated, that after *U.* had paid *K.* 450 dollars, he refused to pay the residue, alleging, that it was a bad bargain; and finally concluded, as his only terms, to pay as follows: 750 dollars in cash, a promissory note, at 60 days, for 1,000 dollars; another note at 90 days, for 820 dollars; *Udall's* bond to *K.* for 1,000 dollars, payable in four years; and 980 dollars, a premium of insurance on the life of the plaintiff. That *K.* having been arrested on a *ca. sa.*, and not able to find bail for the goal liberties, was under the necessity of accepting the terms so offered. That the defendant, *U.*, was advised by counsel, whom he consulted, that *K.* and the plaintiff could not make an absolute and valid transfer of the stock. An assignment was, however, executed by them, in which the consideration expressed was 8,000 dollars, and a receipt thereon indorsed for that amount in full, which receipt was ante-dated at the request of *U.* That a guaranty, by request of *U.*, was

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indorsed on the assignment, stipulating for the performance of the terms, and which was executed by *Ingraham*. That *K.*, a few days after, by the agency of *Ingraham*, procured the two notes to be discounted by *U.*, for 1,663 dollars and 90 cents, and the bond for 500 dollars, and the notes and bond were delivered up to *U.* to be cancelled. That *Ingraham* paid *K.* the 1,663 dollars and 90 cents, but not the 500 dollars. That the plaintiff received no benefit from the money so obtained by *K.*, except about 150 dollars, paid for board and wearing apparel; and *K.*, notwithstanding, was thrown into goal, from which he was discharged under the act. That by an order of this Court, granted *June* 17th, 1819, on the petition of *U.*, he was allowed to receive the dividends on the stock, which had accrued from *January* 1st, 1819. *Prayer*, that the assignment of the stock to *U.* may be declared void, that *U.* be directed to reassign the same to some person, to be appointed in behalf of the plaintiff; and that he account to the plaintiff, for the dividends received by him, with interest, and that the order of the 17th of *June*, 1819, be suspended.

The answer of *Udall* admitted most of the facts stated in the bill; but it denied any unfairness, or undue advantage, in the transaction relative to the purchase of the stock, which he alleged was not worth more than 5,000 dollars. That the assignment and guaranty were prepared without the knowledge of the defendant *U.* That the business was negotiated by *Ingraham*, on whose representations the defendant consented to make the purchase. He denied that he was informed by counsel, that the assignment would not be valid. That *Ingraham* showed him the order of the Court, for the payment of the dividends to *K.*, and the opinion of a lawyer, that by insuring the lives of the plaintiff and *K.*, and obtaining an irrevocable power to receive the dividends, the defendant would be secure in making the purchase. That he agreed with

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Ingraham to pay 4,000 dollars and give his bond for 1,000 dollars, payable in four years, (or when the plaintiff should be of age,) without interest; that he consented to the purchase, at the earnest request of *I.*, who represented the situation of *K*, as embarrassed, and that the sale was necessary for his relief. That he advanced to *I.* 1,300 dollars, and *I.* told him, the next day, that he had paid it to *K.* That he was, afterwards, introduced to *K.*, and told him, that if he objected to the terms, that he might return the money, which had been advanced. That the assignment was prepared by counsel, employed, as the defendant believed by *K.*, and duly executed and acknowledged That the guaranty of *Ingraham* was not taken with any fraudulent intent. That the receipt was indorsed on the assignment by *K.*, without any request from the defendant. That it was no part of the contract that any part of the consideration for the purchase of the stock, should be paid for a premium of insurance on the life of the plaintiff or of *K.*, and no such insurance was ever effected. That the only consideration paid by the defendant for the 8,000 dollars of stock, was 2,800 dollars in cash, 1,200 dollars of six per cent. stock of the *United States*, and the defendant's bond for 1,000 dollars, payable as above stated, and which bond was drawn by *Ingraham*. That all the payments were made to *Ingraham*, when no other person was present, and the defendant believes that *I.* paid the amount (after deducting his compensation) to *K.* That the defendant had received the dividends on the stock, since *January* 1st, 1819. That in *April* or *May*, 1819, *I.* brought him the bond for 1,000 dollars, stating, that *K.* was in great want, and, as he said, at the request of *K.*, offered the bond for 500 dollars; that the defendant paid the 500 dollars, and the bond was destroyed. He denied that the purchase of the bond was any part of the contract for the sale of the stock. He admitted that *K.* had been discharged under the act, and was embarrassed and infirm.

Several witnesses were examined on the part of the

plaintiff; the material facts proved are stated in the opinion of the Court. It appeared that *Ingraham* was dead.

June 2d. The cause came on to be heard this day, on the pleadings and proofs.

Wells, for the plaintiff, made the following points: 1. That the assignment of the stock, from the plaintiff and her husband to *Udall*, was in violation of the special trusts contained in the deed of settlement of the 21st of *June*, 1814, and therefore void. (*Hyde* v. *Price*, 3 *Vesey*, 437.)

2. That the assignment was void as against the equitable rights of the plaintiff, to have the whole of the stock settled and secured for the separate benefit of herself and her children. (*Jewson* v. *Moulson*, 2 *Atk.* 417. *Like* v. *Beresford*, 3 *Vesey*, 509. *Macaulay* v. *Philips*, 4 *Vesey*, 15. 19. 14 *Johns. Rep.* 527.)

3. That the defendant *U.*, in obtaining the assignment, took an unconscientious advantage of the necessities of *K.*; and admitting it to have been otherwise valid, it ought not to stand, except as security for the amount which *U.* shall satisfactorily prove to have been paid by him for the consideration.

Slosson, contra, stated the following points: 1. That the property of the stock in question was a *vested* interest, subject to the limitation over, on the contingency of the wife dying without issue before twenty one. (3 *Bro. C. C.* 3. 1 *Roper on Legacies*, 184.)

2. That the husband, at law, has an absolute right to all his wife's personal estate, and a qualified right to all her *choses in action*, which includes the power of disposing of them. (*Co. Litt.* 351. *a. Comyn's Dig.* tit. *Bar. and Feme*, pl. 81. 82.)

3 That if the husband had a right to dispose of the stock, the wife cannot impeach the transfer, on the ground

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that it was unfairly or improperly obtained. That right belongs only to the husband, or those deriving an interest under him. That equity never interferes with the legal right, but leaves it to the husband undisturbed. (2 *Johns. Ch. Rep.* 208. 2 *Atk.* 420. 514. 2 *P. Wm.* 641. 1 *Ves.* 536. 3 *Bro. C. C.* 195. 1 *P. Wm.* 459. 10 *Johns. Rep.* 484. *Doug.* 520. 3 *Vesey*, 617. 9 *Vesey*, 176.)

4. That the stock is legal, not equitable property; and the wife, on arriving at full age might maintain an action against the bank in whom the title is vested.

5. That the wife, at the time of the transfer, was not a *ward* of this Court. (1 *Madd. Ch.* 277. *Ambl.* 303. *Cases temp. Talbot*, 58. 3 *Vesey*, 506. *n. a.* 1 *Vesey*, 31.)

6. That even if the stock was equitable property, yet a specific assignment of it, by contract, for a valuable consideration, is valid, and not subject to any equity of the wife for a provision. (1 *P. Wm.* 459. *note.* 2 *Vernon*, 207. 1 *Equ. Ca. Abr.* 58. 1 *P. Wm.* 247. 458. 1 *Vernon*, 7. 2 *Atk.* 551. 11 *Vesey*, 18.)

7. That the dividends on the stock, at any rate, are free from all claims of the wife. (2 *Vesey*, 562.)

8. That if the stock is subject to an equity, it can only extend to a part, and not to the whole; and the full amount of the principal and interest advanced by the defendant ought to be reimbursed.

THE CHANCELLOR. The wife is here the plaintiff, and the bill is against her husband and the assignee of her husband, to set aside an assignment by him to the defendant *Udall*, of her interest in 8,000 dollars of the stock of the *Bank of America*. She was married at the age of sixteen, and is still an infant. The assignment of her interest in that stock, was made by her husband and her, within a year after her marriage; and as far as the assignment was her act and deed, it was and is, of course, null and void, by

reason of her infancy. The case is to be considered precisely as if the husband had alone executed the assignment.

The circumstances attending the sale and assignment of this stock, by the husband to the defendant *Udall*, are of an aggravated nature, and denote an unfair and unconscientious advantage taken of the necessities of the husband. The defendant *Udall* admits, that he knew, at the time of the transaction with *Kenny*, of the existence of the deed of trust or settlement, and that he saw it. By that deed, *Thomas Hewitt*, the father of the plaintiff, makes a disposition of 310 shares which he owned in the *Bank of America*. He makes over those shares to the President, Directors and Company of the Bank, in trust, among other things, to pay to the plaintiff the dividends on 8,000 dollars of the stock, as the same should accrue, for her education, and to transfer to her the principal, at the age of twenty-one; and that if she should die before the age of twenty-one, without issue, the principal was to go to his son *Thomas*. The Bank refused to accept of the trust, and by an order of this Court of the 3d of *July*, 1815, the assistant register of this Court was appointed a trustee, to execute the trust raised by the deed of settlement. The defendant *Udall* admits, also, that he knew that the plaintiff was an infant. It is in proof that the husband was poor, and in embarrassed circumstances, when the sale of the stock took place, through the agency of one *Ingraham*, an intimate friend of the defendant *Udall*. It is admitted that *Udall* was acquainted with this pecuniary embarrassment of *Kenny*, when he entered into the negotiation for the purchase of the stock. It is also in proof, that *Udall* was informed by counsel, whom he consulted, that the plaintiff, being an infant, could not legally transfer her stock. *Udall* was to give nominally 5,000 dollars, for 8,000 dollars in the bank stock; and he says, in his answer, that he paid in cash to *Ingraham*, before the assignment, 1,300 dollars, and 1,500 dollars after the sale, and delivered to him *United States* stock, to

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the amount of 1,200 dollars, and a bond for 1,000 dollars. The plaintiff does not admit, that *Udall* ever paid to *Kenny*, or to *Ingraham*, or to his agent, in the whole, above 2,900 dollars, or thereabouts. and that not above 150 dollars ever came to the use of the plaintiff; and there is no other proof of the payments alleged to have been made by the defendant *Udall*. The bond was for 1,000 dollars, payable in four years, without interest; and the defendant admits, that he took it up in the hands of *Ingraham*, and cancelled it, on paying 500 dollars. This last act marks the character of the whole transaction, and shows that the defendant made a most unconscientious speculation out of the distresses of the husband, or the fraud of his agent; and if the inquiry now was, as to the amount of these payments, I should think that the defendant *U.* ought to be put to the proof of his payments, as every person is obliged to do, when strong symptoms of fraud or imposition appear. (3 *P. Wm.* 288. 5 *Vesey*. 48, 49.) There is reason to believe the defendant retained the 980 dollars which were intended to be appropriated as a premium for insurance on the plaintiff's life, until twenty-one, and that he meant to stand as his own insurer, after the application to the company for insurance had failed. It appears, that shortly after this speculation, and after the defendant *Udall* had got into the possession of the dividends of this bank stock, *Kenny* having found no relief from this dissipation of his wife's property, was imprisoned for debt, and discharged under the insolvent act, and continues still embarrassed and infirm. The bill charges. that he was unable to procure the necessaries of life. Dealing in the manner which has been stated, with a necessitous person in distressed circumstances, and for the future and contingent interest of his infant wife, forms a very alarming case. and one that would seem to call for relief. (even if the assignment was otherwise valid,) to the extent of making the assignment stand as a

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security only for the amount which the defendant *U.* should satisfactorily prove to have been actually paid.

But independent of any undue advantage taken of the husband, the wife had an equitable interest in that fund, which could not be defeated by the act of the husband; and that interest she is entitled to assert, and to have protected against the claim of the assignee. The right of the plaintiff in this case, was an equitable right, known by the name of the wife's equity, and the husband could not dispose of it, but upon the condition of its being subject to a suitable provision for her support.

The wife's equitable right to her personal property, in the hands of trustees, cannot be disposed of by her husband, without making a suitable provision for her support.

The stock was trust property, under the control of the Court, and placed under the care of one of its officers. The legal title, at this time, is probably in the personal representatives of *Hewitt*, and there can be no doubt of the power and duty of the Court, notwithstanding the assignment by the husband to *Udall*, to give full effect to the equitable title of the plaintiff. It is now understood to be settled, that the wife's equity attaches upon her personal property, when it is subject to the jurisdiction of the Court, and is the object of the suit, into whosoever hands it may have come, or in whatever manner it may have been transferred. The same rule applies, whether the application be by the husband, or his representatives or assignees, to obtain possession of the property, or whether it be by the wife or her trustee, or by any person partaking of that character, praying for a provision out of that property. It is equally binding, whether the assignment be by operation of law, or by the act of the party to general assignees, or by particular transfer to an individual, and whether that particular transfer has been voluntary, or been made for a good and valuable consideration.

The wife's equity, as it is called, attaches to her personal property whenever it is subject to the jurisdiction of the Court, in whatever hands it may be, or in whatever manner it may have been transferred.

In *Gardiner* v. *Walker*, (1 *Str.* 503.) the bill was filed by the executor of the testator, to stay the husband, who had instituted a suit in the Spiritual Court for his wife's legacy. Lord *Macclesfield* said, it made no difference who

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was plaintiff in equity, and he directed, that the money should be disposed of for the benefit of the wife In the case *ex parte Coysegame*, (1 *Atk.* 192.) and in *Elibank* v. *Montolieu*, (5 *Vesey*, 73.) the wife, as in the present case, applied to the Court, and had her equity secured.

This equity of the wife stands upon the peculiar practice of the Court, and not on any general reasoning.

Assuming that the defendant *Udall* was a *bona fide* purchaser of the wife's personal estate, for a valuable consideration, or that the same had been fairly assigned to him by the husband as security for a debt, or in payment of a debt, yet the wife's equity would not be affected. This equity, as the Master of the Rolls said, in *Murray* v. *Lord Ellibank*, (13 *Vesey*, 6.) stands upon the peculiar doctrine of the Court, and we must ascertain the extent of the doctrine, not by general reasoning, but by the practice of the Court. The case of *Jewson* v. *Moulson*, (2 *Atk.* 417.) may be selected as the first direct authority in favour of the wife's equity, as against a particular assignment by the husband of her equitable portion, for a valuable consideration. *Vobe* being indebted to the defendant *Moulson*, assigned over to him all the share which, in right of his wife, he was entitled to, in her father's personal estate. The father had, by will, given the proceeds of his real estate to his executors, in trust, after certain payments charged thereon, to be divided between his sons and his daughter, and if either died before twenty-one, the share of such person was to go to the survivor. This daughter was married to *Vobe*, and had no settlement, and was an infant when the assignment was made to *Moulson*. The case is, therefore, very considerably analogous to the one now before me. There were two bills brought: one by the executors, to be discharged of the trust, upon paying and assigning over the wife's share, and the other by the defendant *M.* to be paid that share, under his assignment. Lord *Hardwicke* held, that there was an equity attached to the property itself, and that the assignee took it subject to that equity. It was an equity grounded upon natural justice, and pre-

vailed equally against the husband and his executors, and his general assignees, and his voluntary assignee. In all these cases, the equity was extremely clear, and the only instance where the party had got the better of that equity, was the case of a particular assignment of a specific article, for a valuable consideration. But in that case, he relied upon the circumstances, that the wife, during all the transaction, was an infant, and a particular object of the care of the Court, and that it was an assignment at once of her whole portion, and that the defendant *M.* was chargeable with notice of the wife's equity, and that the husband was in debt before he married, and had married the wife clandestinely.

It is remarkable, that in all these particulars, that case, and the present one, correspond; and Lord *Hardwicke* required a provision to be made for the wife, out of the portion, before the claim of the creditor could be admitted. The parties afterwards agreed to let the wife have half the portion, after deducting the costs, and that the other half should go towards the debt. The Chancellor decreed, that the agreement should be performed, having previously declared, that he should not allow the creditor to receive the whole fortune of the wife, without a provision for her. After this case, it is not so easy to understand, how Lord *Thurlow* should have been able to say, in *Worrall* v. *Marlar*, and *Busknan* v. *Pell*, (1 *P. Wm.* 459. note by *Mr. Cox*, and 1 *Cox's Cases*, 153. *S. C.*) that "he did not find it any where decided, that if the husband make an actual assignment by contract, for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned."

Again, in the case of the *Earl of Salisbury* v. *Newton*, (1 *Eden*, 370.) the wife was held to be entitled to a provision against the particular assignee, who was a creditor of the husband, for a valuable consideration, of the whole of her

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equitable interest. The Lord Keeper declared, that the assignment could not stand against the wife and her issue; and he directed an inquiry as to a proper provision for herself and children, and that the overplus, if any, should go to the creditor.

This last case was in 1759, and seems also to have been overlooked by Lord *Thurlow*, for it appears to carry the wife's equity to an extent, which he had not discovered.

The case of *Like* v. *Beresford*, (3 *Vesey*, 506.) put an end to all previous doubts on the subject. Lord *Alvanley* directed the settlement of the property of a married woman, a ward of the Court, and of all the dividends and interest accrued, in opposition to the assignment by the husband, for a valuable consideration. He observed, in the learned review which he gave of all the cases, that Lord *Hardwicke* gave a reason which was convincing, in favour of the wife against any assignee of the husband; that a decision in favour of an assignee for a valuable consideration, would put an end to the equity of the wife. Lord *Hardwicke* and Lord *Northington* had given decided opinions, that an assignment, even for a valuable consideration, would not avail against the wife's equity. The subject came before Lord *A.* again, in *Macaulay* v. *Philips*, (4 *Vesey*, 15.) and he said, he was clearly of opinion, that the doubt respecting the assignment of the husband, for a valuable consideration, of the wife's equitable interest, was not well founded, with the single exception, perhaps, of a trust for a term for years of land, and that the assignment for a valuable consideration would not bar the equity of the wife. If the wife's personal fortune be vested in trustees, or be in any way under the control of the Court, or placed within its reach, the Court will not suffer it to be removed, until an adequate provision be made for her.

Afterwards, in *Wright* v. *Morley*, (11 *Vesey*, 12.) Sir *Wm. Grant* seemed to pause upon the doctrine so emphatically declared by Lord *Alvanley*, and deduced from the decisions

of Lord *Hardwicke* and Lord *Northington*. The husband had assigned, for a valuable consideration, only a part of his wife's equitable interest. He had assigned 100*l.* out of 260*l.* a year, of dividends of stock held in trust for her, and then had gone abroad and left her without any provision. Sir *Wm. Grant* seemed to think it worth his while to look into the authorities in reference to the question, whether there was any difference between an assignment for a valuable consideration, and by operation of law; and he considered it to be a litigated point, whether the equity of the wife could be bound or affected by the husband's assignment for a valuable consideration. But he admitted the assignment to stand, to the moderate extent of 100*l.* out of yearly dividends to 260*l.*, and said, that he could not give her the whole of the dividends. It seemed, however, to be admitted, that the wife was entitled to her ordinary equity for a settlement.

I consider the wife's equity, as against any assignment whatsoever and to whomsoever, to be now too well settled to be shaken. The only inquiry is, *to what extent* shall her equity be carried over her personal estate, not yet reduced to the husband's possession. Lord *Hardwicke* intimated, in *Jewson* v. *Moulson*, that upon a bill by the wife, an injunction ought to be granted to stay execution, upon a judgment at law by the husband suing for his wife's right, until a settlement was made upon her. Such an injunction was actually granted by the Court of Exchequer, in *Winch* v. *Page*, (*Bunb.* 86.) and by the Court of Chancery, in *Meales* v. *Meales*; (5 *Vesey*, 517. *note*;) and, upon general principles of justice, it would appear, that the Court of Chancery ought to restrain the husband from availing himself of any means, either at law or in equity, to obtain possession of the wife's personal fortune, unless he would make a competent provision for her. But we have no concern with that question in this case. The inquiry now is, *how*

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much of the wife's estate shall be preserved from the husband's assignment?

In *Parker* v. *Dykes*, (1 *Eq. Cas. Abr.* 54. *pl.* 6. *Mich.* 1798, *at the Rolls*,) the wife had a provision left her, by her father's will, out of the proceeds of real estate directed to be sold, and the husband became a bankrupt, and died. His assignees brought their bill to have the land sold, and the surplus of the monies paid to them. The Court dismissed the bill, and as the wife was wholly unprovided for, suffered her to retain the *entire* of this legacy.

This was as against the general assignees of the bankrupt husband; and in *Grey* v. *Kentish*, (1 *Atk.* 280. 1 *P. Wm.* 459. *note*, *S. C.*) Lord *Hardwicke* followed that decision, in allowing to the wife *the whole* provision left her by her mother, in opposition to the claim of the assignees of the bankrupt husband. So, again, in *ex parte Coysegame*, (1 *Atk.* 192.) Lord *Hardwicke* gave to the wife the whole of an annuity of £40 a year, secured by bond, and belonging to her before marriage, as against the assignees of the bankrupt husband; and he held, that the creditors stand in the place of the husband, and were not entitled to any more than he would have been. In *Vandenanker* v. *Desborough*, (2 *Vern.* 96.) as early as 1689, the wife was entitled to the interest of £800, invested in land, by the directions of the testator, for her benefit, and that of her children; and the Court held, that *no part of that interest* was liable to the creditors of the bankrupt husband, and the whole principal and interest was ordered to be settled according to the will. It is, also, to be here noticed, that in the case of *the Earl of Salisbury* v. *Newton*, already cited, Lord *Northington* directed a proper provision for the wife, against the particular creditor and assignee of the husband, and that the overplus, *if any*, should go to the creditor. The case shows, that the extent of the provision depended upon the circumstances of the case, and might or might not absorb the whole of the estate. It showed that there

was no precise rule, limiting the provision to a moiety, or two thirds, or to any sum or proportion *less* than the whole. So, also, in *Like* v. *Beresford*, (*ubi supra*,) Lord *Alvanley* observed, that the Court had a complete right, if they thought of it, under all the circumstances, to give to the wife and children, any part, *or the whole*, of the fortune, to which the wife might be entitled.

Other cases have declared a different doctrine, and that the wife is not entitled to the whole of her property to her separate use. This was so said by the Master of the Rolls, in *Burden* v. *Dean; (2 Vesey, jun.* 607.) and the same idea was thrown out in *Wright* v. *Morley*, in respect to a life interest of the wife, and that by the modern cases, the wife only took a portion of that provision, as against the assignees of the husband. In *Beresford* v. *Hobson*, (1 *Madd. Ch. Rep.* 362.) the Vice Chancellor reviewed the cases, and concluded, that where a legacy was left to the wife, posterior to the mortgage, and there was a settlement on her marriage, she was not entitled to the whole of the legacy, as against the assignees of her husband. He said, that in no case had the Court given the whole to the wife. The Court, in the exercise of its discretion, had never tied itself down to any precise rule, but it had never given the whole.

The extent of the wife's equity, whether it goes to a part only, or the whole, of her personal property, depends on the circumstances of the case.

These observations of the Vice-Chancellor, must be taken under some qualification, arising out of that case, for several of the authorities which have been already referred to, are in contradiction to them, if taken in their utmost latitude. He refers, also, to the case of *Like* v. *Beresford*, as containing an exception, and that where a *ward* of the Court had been run away with, the Court would not give the husband any part of his wife's fortune. "It has a discretion in such cases, whether it will give the whole, or a part, to the wife." And why not in every case, if the justice of it, and the condition of the wife, require it? The whole of this doctrine, as it was observed by Sir *Wm. Grant*, depends upon the particular practice of the Court, and not on

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general reasoning; and I think I may venture to say, that the practice of the Court has not been sufficiently fixed and uniform, to form a determinate rule, controling the exercise of the discretion of the Court in the particular case. The question, in every case, is, what is a suitable and adequate provision for the wife, under the circumstances? The provision must have a reference to the whole of the wife's fortune, and to what the husband had previously received.

If the husband lives with his wife, and maintains her, and has not misbehaved, he will be allowed to receive the interest or dividends on her property.

If the husband lives with his wife, and maintains her, and has not misbehaved himself, the course of the Court has been, to leave to him the receipt of the interest or dividends of her fortune, *(Sleech* v. *Thovington*, 2 *Vesey*, sen. 560. *Bond* v. *Simmons*, 3 *Atk.* 20.) In the present case, the husband has misbehaved himself, in the prodigal waste of his wife's fortune, and suffering her to be left helpless and destitute, while still an infant. The interference and purchase by the defendant *Udall*, with knowledge of the trust and of the infancy of the wife, and of the necessities of the husband, and against the advice of counsel, and upon terms denoting oppression and undue advantage, does not deserve the least countenance or assistance. It is to be presumed, that the bank stock was the whole of the wife's fortune; and the husband would, in an ordinary case, have been entitled to the dividends to maintain his wife, and they were accordingly directed to be paid to him, soon after his marriage. But he has grossly abused his marital right, by selling the whole contingent interest of the wife, in advance; and in justice to the wife, the authority to receive the dividends by him, or by *Udall*, ought to be withdrawn.

It will be sufficient, in this case, to declare, that the assignment by *Kenny* to *Udall* was null and void, so far as respected the equity of the plaintiff, and that her equitable claim to that property remains unimpaired, equally as if no such assignment had been made. I shall further declare, that the assignment was made, and was procured, in

fraud of her rights, and that the orders of this Court directing the dividends to be first paid to *Kenny*, and afterwards to *Udall*, be rescinded; and that Mr. *Kip*, the trustee, be directed to pay the dividends hereafter to arise, and to be received, to the solicitor for the plaintiff, to the discharge of the plaintiff's costs of this suit, and then to pay the dividends not so wanted, until the further order of this Court, to the plaintiff herself, or to her particular orders in writing, to be given, from time to time, as each dividend becomes due. To what extent a provision ought to be made for her, may be determined upon the usual reference, when she arrives at the age of twenty-one, and she then may apply, upon the foot of this decree, for such provision. And it is hereby declared to be the duty of the President, Directors and Company of the *Bank of America*, not to permit any transfer of the shares appropriated in the deed of trust to the plaintiff, (being shares at par to the amount of 8,000 dollars,) without the order of this Court, and that the solicitor for the plaintiff give notice of this decree to the bank.

Decree accordingly.

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Though a widow's remedy for dower, is, *prima facie*, at law; yet, where the title is admitted, but impediments are thrown in the way of her proceeding at law, this Court will sustain a bill, filed by her, for her dower.

An antenuptial agreement, that the intended wife shall exclusively enjoy property, held by her as widow and administratrix of her former husband, and which is not expressed to be in lieu of dower, is no bar to her claim for dower in the estate of her second husband.

A deed given by a husband just before his marriage, to his daughter, without any consideration, and kept secret until after the marriage, is fraudulent and void, as against the wife's claim to dower.

A conveyance of land by the husband, during coverture, in trust for his wife, to whom the trustee afterwards conveys it, but which was not intended or accepted in lieu of her dower, is no bar to her claim of dower, after his death.

A release by the husband of his equity of redemption in lands mortgaged, not executed by the wife, though she joined in the mortgage, is no bar to her claim of dower in the equity of redemption, or remaining interest of the husband in the land, after satisfaction of the mortgage.

She is, however, bound to contribute rateably to the redemption of the mortgage.

And where the heir has redeemed the land, by paying off the mortgage, and the widow files her bill against him for dower, the mode in which she is to contribute, is, by paying, during her life, to the heir, one third of the interest on the amount paid by him, to be computed from the time of such payment, or the value of such annuity, according to the circumstances, to be computed by a master.

And the husband being considered as having died seized of the land, subject to the mortgage, the widow is entitled to one third of the rents and profits from the time of his death.

June 7th, and *August* 13th.

THE plaintiff, *Dorothy Swaine*, on the 1st of *October*, 1819, filed her bill, stating, that she is the widow of *Simon Swaine*, who died, seised and possessed of a dwelling house, farm, &c. on the 31st of *March*, 1816, intestate,

leaving the defendant, *Catharine Perine*, his only child and heir at law. That being entitled, as she was advised, to one third part of the premises, of which her husband so died seised, situate in *Southfield*, in the county of *Richmond*, during her life, she, on the 13th of *December*, 1816, demanded of the defendant to assign to her, the plaintiff, her dower in the premises, which were particularly described in the bill. That the defendant, since the death of *S. S.*, as his heir, has possessed herself of all the title deeds to his said property, and holds and occupies the premises, to the entire exclusion of the plaintiff, and refuses to assign to her her dower therein. The bill *prayed*, that the defendant might be decreed to assign to the plaintiff, the one third part of the premises, as for her dower, and for general relief.

The defendant, in her answer, (filed *December* 23, 1819,) admitted the marriage of the plaintiff, as stated, with *S. S.*, and that he was in possession of the premises, but denied that she had any title deeds. That *S. S.* continued in possession of a part of the dwelling house, until his death; but that, as she is advised and believed, he was not at the time of his marriage, nor at any time during the coverture, so seised as to entitle the plaintiff to dower. The defendant stated, that the plaintiff lived on the premises with *S. S.* at the time of his decease, and has ever since resided thereon: but that a greater part of the premises were in the possession of the defendant's son, as her tenant, before, and at the time of the death of *S. S.*, and which the defendant held in absolute right, by virtue of a conveyance to her by *S. S.*, before his marriage with the plaintiff. That the plaintiff, at the time of her marriage with *S. S.*, owned considerable real and personal property; and before, and in contemplation of marriage, it was agreed between her and *S. S.*, that she should enjoy her said estate during coverture, to her sole and separate use. That *S. S.* having

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so agreed with the plaintiff, by an instrument, executed the 12th of *November*, 1794, in consequence thereof, the defendant being his only child, in order to make provision for her, did, on the 14th of *November*, 1795, execute a conveyance to her, her heirs and assigns, of the farm and premises, in which the plaintiff now demands dower, with full covenants against incumbrances, &c., which deed was duly acknowledged and in full force, before the marriage of the plaintiff with *S. S.*; and the defendant, by her son and tenant, was in the actual possession of the farm and premises, (except a small part of the dwelling house and a burial place,) before, and at the time of the death of *S. S.* That *S. S.*, in his life time, for the nominal consideration of 500 dollars, conveyed eleven acres of woodland to *John Dunn*, who executed a declaration in trust in favour of the plaintiff, and after the death of *S. S.*, *Dunn* conveyed the eleven acres of land to the plaintiff, in execution of the trust. That *S. S.*, and the plaintiff, his wife, executed a mortgage of the premises in which she now claims dower, to *J. D.*, to secure the payment of 1,000 dollars; which mortgage was outstanding at the time of the death of *S. S.* That *S. S.*, with the privity and consent of the plaintiff, on the 8th of *August*, 1815, released the *equity of redemption* in the mortgaged premises to *J. D.*, so that *S. S.* did not, in any manner, die seised of the premises. The defendant submitted, that if the plaintiff is entitled to dower, it can only be upon the payment of one third of the principal, interest and costs due on the mortgage, which the defendant, by a decree of this Court, on a bill filed by her and her son, was allowed to redeem. The defendant admitted, that she and her son were in possession of the premises, except part of the dwelling house, occupied by the plaintiff; and she denied that she ever refused to assign dower to the plaintiff, who had never demanded an assignment of it.

On the 4th of *February*, 1820, the defendant filed a *cross bill* for a discovery, and copies of the several deeds, and in-

struments in writing, alleged to be in the possession of the plaintiff. The plaintiff, in her answer to the *cross bill*, filed on the 20th of *October*, 1820, denied that she had any real or personal estate, at the time of her marriage with the intestate, except as widow and administratrix of her first husband, *Charles Garrison*, being her dower in about twelve acres of land, and personal property, in her possession, as administratrix, specified in a schedule annexed to the antenuptial agreement mentioned in the bill, copies of which were set forth. She alleged, that this agreement was not in lieu of dower, but merely as an inducement to the marriage. She admitted the deed from *S. S.* to the plaintiff, but alleged that it was kept secret until after the marriage; and on a bill, filed by the defendant and her son against *Dunn*, was decreed to be fraudulent. She admitted the conveyance of the eleven acres of land to *Dunn*, and the declaration of trust. She stated, that the consideration, as respected *Dunn*, was nominal, but that the conveyance was made to compensate her for advances made by her to *S. S.*, during her coverture, which exceeded the sum of five hundred dollars, and that the eleven acres were not worth that sum. She admitted that *S. S.* died in debt, that she administered on his estate, and that the personal estate was not sufficient to pay his debts; that the bond and mortgage given to *D.* was to raise money to defray the expenses of suits brought by the plaintiff and her husband, in his life time, and the mortgage is still outstanding. She admitted, that *S. S.* executed a release of the equity of redemption to *D.*, in the execution of which she acquiesced, for the purpose of providing for the payment of debts; but she alleged, that *D.* never, in fact, paid the consideration money, and that he afterwards delivered up the deed, as being of no effect. She admitted the payments, stated in the cross bill, on the mortgage, and prayed the benefit of the evidence taken in the suit, by the defendant *P.* and her son, against *Dunn*. She de-

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nied that the title deeds were in her possession, and any knowledge of them.

John Dunn, who was examined as a witness, proved the demand of dower by the plaintiff, and the defendant's refusal. He stated, that the conveyance of the eleven acres to the plaintiff, was in consideration of advances made by her, from time to time, to *S. S.*, out of the moneys belonging to her, as administratrix of *C. G.*, her former husband; and that they were not the proper moneys of *S. S.* That the witness received the release of the equity of redemption from *S. S.*, and it was a short time in his possession, when he put it into the hands of his attorney, in a suit against *S. S.*, for the purpose of having it done away. That he never paid any consideration for the release, and never relied upon it as a valid instrument; but his attorney produced it to the defendant's solicitor, to induce him to agree to a settlement. His testimony was confirmed by that of his attorney. It was proved, that after the death of *S. S.*, *Dunn* proceeded to foreclose the mortgage.

June 7th. The cause came on to be heard on the pleadings and proofs.

Wallis, for the plaintiff. He cited 6 *Johns. Rep.* 290.

H. W. Warner, contra, contended: 1. That the plaintiff's claim to dower could not be supported in equity. She had the benefit of the ante-nuptial agreement, and of the eleven acres of woodland; amounting in value to more than one third of the premises.

2. That by joining her husband in the mortgage to *Dunn*, the plaintiff parted with her right of dower; her legal right was barred; and she was not entitled to be endowed in an equity of redemption. (2 *Powell on Mortg. ch.* 16. p. 701, 702, 703, and 704. 8 *Tyng's Mass. Rep.* 491. 9 *Tyng's Rep.* 161. 218. 7 *Tyng's Rep.* 14.) In the cases of *Hitchcock* v. *Harrington*, (6 *Johns. Rep.* 290.) and

of *Collins* v. *Torry*, (7 *Johns. Rep.* 278.) the wife did not join in the mortgage. So, in *Coles* v. *Coles*, (15 *Johns. Rep.* 319.) it was merely decided, that where a person seised in fee, mortgages the land, and afterwards marries and dies, his widow is entitled to dower in the equity of redemption. There is no case in which it has been decided, that a wife who has executed the mortgage, and thereby released every thing in her power, was entitled to dower. The observation of the Chancellor, in *Tabele* v. *Tabele*, (1 *Johns. Ch. Rep.* 45, 46.) is a dictum, obviously founded on the cases in the 6th and 7th *Johns. Rep.* before cited.

3. The release of the equity of redemption, given to *Dunn*, by the plaintiff's husband, and with her assent, extinguishes all claim in equity. The release was delivered to *D.*, and was used, in one instance, as a muniment of title. The plaintiff cannot set aside that release. It is conclusive here.

5. The defendant has paid debts to the amount of 400 dollars, and the mortgage was a debt. The conveyance of the eleven acres, being *voluntary*, was void, as against creditors.

August 13th. The cause stood over for consideration until this day.

THE CHANCELLOR. This is a bill for dower; and the bill charges, that the defendant is the only child and heir at law of *Simon Swaine*, her late husband, and that she has possession of the title deeds, and refuses to assign dower. The jurisdiction of the Court is not questioned by the defendant; and that jurisdiction appears to be well established, in cases where no legal bar or impediment is raised to the title. The practice is to decree the dower to be set out by the master, as was done in the case of *Goodenough* v. *Goodenough*, (*Dickens*, 795.) or to grant a commission to assign dower, as was mentioned in *Curtis* v. *Curtis*, (2 *Bro.* 620.)

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In the case last mentioned, the subject was very fully discussed, and the cases touching the jurisdiction of the Court, reviewed by the *Master of the Rolls*. He admitted, that the widow's remedy was, *prima facie*, at law, and the dower was a mere legal demand, but that on the allegation of impediments thrown in the way of her proceeding at law, this Court can assume jurisdiction, and give her relief for her dower. To say, that the widow should have no damages when her dower was assigned to her in Chancery, was a proposition not supported by Lord *Coke*, in *Co. Litt.* 33. *a.* for he was there speaking of the writ *de dote assignanda*, and not of a decree of a Court of Equity. On that writ from Chancery, there are no damages, because there is no deforcement of the widow. This Court has jurisdiction, and will relieve the widow as it relieves an infant. If she comes here for a discovery of the title deeds in the hands of the heir, she is to have her complete relief in this Court. If you deny her right to dower, the *Master of the Rolls* said, in the case cited, the question must be tried at law; but when the fact is ascertained, she shall have her relief in equity. The course of the Court has been to assign her dower, and, universally, to give her an account of the mesne profits, from the death of her husband.

Though a widow's remedy for dower, is, prima facie, at law; yet where the title is admitted, but impediments are thrown in the way of her proceeding at law, this Court may assume jurisdiction, and give her relief for her dower.

The same question of jurisdiction was examined, in *Mundy* v. *Mundy*, (4 *Bro.* 295. 2 *Vesey*, jun. 122.) and the authority and settled practice of the Court, and the utility and convenience of that practice, clearly asserted, and ably vindicated, by Lord *Loughborough*. That was the case of a bill for dower, and for an account of the mesne profits from the death of the husband. There was a demurrer put in, on the ground, that the widow's remedy was at law. The Chancellor asserted a concurrent jurisdiction, though there was no difficulty in the way at law, and that writs of dower had almost gone out of practice, for there was intricacy and difficulty, and no costs in the remedy by writ, at law. If the legal title to dower was

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controverted, it must be made out at law, but where there was no dispute of that kind, there was no need of sending the party to law.

But the defendant has not interposed any demurrer in this case. She has submitted to this Court her objections to the right of the plaintiff, and they have been discussed by counsel, as properly cognizable in this Court. I shall, therefore, proceed to the merits of the defence set up by the defendant, who is the heir at law.

The marriage, seisin, and death of the husband, are admitted; but it is objected:

An ante-nuptial agreement, by which the intended wife was to enjoy exclusively, property derived as the widow of her former husband, and which was not expressed to be in lieu of dower, is no bar to a claim of dower in the lands of the second husband.

1. That there was an ante-nuptial agreement made, on the day of the marriage, between the husband and wife, by which she was to enjoy exclusively, for her own benefit, some real and personal estate. She says, that the real estate consisted only of her right of dower as the widow of a former husband, in twelve acres of land, and that the personal estate is about 950 dollars, which she held as administratrix of her former husband. There is nothing to gainsay her answer to the cross bill on this point; and this agreement was not stated to be in lieu of dower in the lands of her second husband, *S. Swaine*; and there is no colour for the suggestion, that this agreement formed any impediment to her present claim.

A deed given by a husband, just before marriage, to his daughter, without any consideration, and kept secret until after the marriage, was held to be fraudulent as against the wife's claim to dower.

2. The deed from *Swaine*, to his daughter, the defendant, dated the 14th of *November*, 1794, and on the day of the marriage, is also set up to show, that the husband was not seised of the premises, during the coverture. But by an order made during the progress of this cause, the testimony taken in the cause of *Catharine and Simon Swaine, jun. against John Dunn*, in which the validity of that deed was put in issue, is admitted to be read in this cause; and upon that testimony, it has been already decided, (*Perine* v. *Dunn*, 3 *Johns. Ch. Rep.* 508.) that the deed was fraudulent and void, as against *Dunn*, a subsequent mortgagee.

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As it was fraudulent in fact, and kept concealed, and possession never went along with it. and as it was given without consideration, the deed is equally to be adjudged fraudulent as against the plaintiff.

A conveyance of land by the husband during coverture, in trust for his wife, not intended or accepted in lieu of dower, is no bar to her claim of dower on his death.

3. The conveyance by the husband, during coverture, of eleven acres of woodland, to *John Dunn*, in trust for the plaintiff, and which trust was afterwards executed by *Dunn*, is also set up by the defendant, as an equitable bar of the plaintiff's right of dower. But it is sufficiently proved, that the deed to *Dunn*, in trust for the plaintiff, was given for advances made by her during coverture, to and for the use of her husband, and that those advances were actually made by her out of moneys belonging to her, as administratrix of her first husband, to an extent much beyond the value of eleven acres. This objection to this claim is equally destitute of any foundation. The conveyance of the eleven acres, even if voluntary, would have been no bar of dower, for it was never intended to be made or accepted upon any such condition, but it appears to have been made upon a fair and valuable consideration.

A release by the husband of his equity of redemption, not executed by the wife, is no bar to her claim of dower.

4. Another objection, which seemed to be much more relied on, was the release by *S. Swaine*, the husband, of his equity of redemption in the premises to *John Dunn*, after having mortgaged the same to him for 1,000 dollars. But the answer to this objection is, that the plaintiff was no party to that release, and her right of dower in the equity of redemption could not, therefore, be affected by it. In the next place, it may be observed, that the release itself was without consideration, and was never accepted by *Dunn*, though he had it, for a few weeks, in his possession. It was a voluntary act of *Swaine*, without any consultation or contract with *Dunn*; and the latter took it, not as an absolute and valid release, but rather as a trustee for *Swaine*, who was then languishing with disease. *Dunn* never acted under it, or treated it as a valid conveyance; but he proceeded,

after the death of *Swaine*, to foreclose his mortgage under the power contained in it; and in the bill filed by the defendant as heir, to redeem the mortgage, the release was not set up by *Dunn*, as a bar to the redemption. The defendant was, by the decree of this Court in the cause already referred to, allowed to redeem, and she has actually redeemed the land in which dower is now sought, from the incumbrance of that mortgage. In every view of the subject, this release is no obstacle to the claim of dower.

A feme covert, who has joined her husband in a mortgage of land of which he was seised, is, nevertheless, entitled to dower in the equity of redemption; subject, however, to a rateable contribution, as dowress, for the redemption of the mortgage.

5. The only part of the defence, that has solidity in it, is the claim by the defendant, upon the plaintiff, to contribute proportionably, as dowress, to the redemption of the mortgage; and it appears to me, that her pretension here is well founded.

The plaintiff was a party to the mortgage to *Dunn*, and her claim to dower was only in the equity of redemption, or the interest which her husband had *remaining* in the land, after satisfaction of the mortgage. Her right of dower was subject to the mortgage; and if the heir has been obliged to redeem the land, by paying that mortgage *to which the plaintiff was a party*, she ought, in justice and equity, to contribute her rateable proportion of the monies paid towards redeeming the mortgage. The redemption was for her benefit, so far as respected her dower. To allow her the dower in the land without contribution, would be to give her the same right, that she would have been entitled to, if there had been no mortgage, or as if she had not duly joined in it. It would be to give her dower in the whole absolute interest and estate in the land, when she was entitled to dower only in a part of that interest and estate. In *Palmer* v. *Danby*, (*Prec. in Ch.* 137.) the Lord Keeper allowed a dowress to redeem a mortgage on land, which had descended to an infant, subject to incumbrances, by paying her proportion of the mortgage money, and to *hold over for the rest*. By this case, I understand

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her *proportion* of the debt was to be borne by her dower interest, and that she was to hold the land in the character of an assignee of the mortgage, 'until she was reimbursed as to the residue of the mortgage debt.

In *Banks* v. *Sutton*, (2 *P. Wm* 700.) Sir *Joseph Jekyll* gave to the widow her dower, in the equity of redemption, of a mortgage in fee; and though the case has since been overruled, in respect to her title in such a case, yet if she be entitled, the terms of the decree were, no doubt, just, and ought to be regarded as authority. In that case, the Master of the Rolls decreed to her the arrears of her dower from the death of her husband; and she was to allow, or keep down, *the one third of the interest of the mortgage money, unsatisfied at that time.* The bill in that case was, to redeem the mortgage, given by the person from whom her husband derived title; and in her bill, she offered to pay, or keep down, the one third of the interest of the mortgage money, remaining unsatisfied.

This case refers to *the death of the husband*, as the time from which the amount, to which the widow is to contribute, is to be deduced; and, as far as the husband had reduced the mortgage debt in his life time, that was doubtless so far a redemption for the benefit of the wife, as well as himself. She is only to contribute, to relieve the land of the incumbrances, to the extent in which it existed when the husband died.

And she is, also, entitled to an account of the mesne profits, from the time of the death of her husband; who is considered as having died seised of the land, subject to the mortgage.

I shall, therefore, decree, that the plaintiff is entitled to her dower in the ninety acres, and to an account of the mesne profits, from the death of the husband. The husband, in this case, is to be considered as having died seised of the equity of redemption, or of the real estate, subject to the mortgage; and in such cases, it appears, by the cases already cited, and by that of *Oliver* v. *Richardson*, (9 *Vesey*, 222.) to be the settled course, to compute the rents and profits from the husband's death. But as the plaintiff has been and still is in possession of a proportionate part of

the dwelling house on the premises, the account of the mesne profits ought to be confined to the farm, exclusive of the dwelling house, and which ought not to enter into the computation. She will be entitled to one third part of these mesne profits, when ascertained, and to one third part of the dwelling house and land, after deducting her rateable contribution towards the redemption of the mortgage.

The next question is, how is the plaintiff to contribute rateably to discharge the mortgage debt. If she was to pay one third of the debt and interest (exclusively of costs) paid by the defendant, together with interest on that one third, from the time the defendant paid it, there could be no doubt that this would be to the defendant a satisfactory contribution. But the plaintiff has only a life interest in the dower. and payment of the entire one third of that debt would be unjust. It would be making her pay for a life estate, equally as if it was an estate in fee. The more accurate rule would appear to be, that she should "keep down" one third of the interest of the mortgage debt, by paying, during her life, to the defendant, the interest of one third part of the aggregate amount of the principal and interest of the mortgage debt, paid by the defendant, to be computed from the date of such payment. But as it would be inconvenient and embarrassing to charge her with such an annuity, then let the value of such annuity from the plaintiff, (her age and health considered,) be ascertained by one of the masters of this Court, and be deducted from the amount of the rents and profits so coming to her; and if that value should exceed the the amount of the rents and profits so coming to her, that then, the residue of such value be deducted from the dower to be assigned to her, out of the house and land mentioned in the bill. The question is, if an estate in fee, in one equal third part of the premises, ought to pay the one equal third part of

Where the heir has redeemed the land by paying off the mortgage, and the widow files her bill against him for her dower, the mode in which she is to contribute, is by paying, during her life, to the heir, the one third of the interest on the amount paid by the heir, from the time of such payment, or the value of such annuity, to be computed by a master.

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the mortgage debt and interest, paid by the defendant, then what proportion ought the plaintiff's life estate, in that one third part, to pay? I apprehend the value of such an annuity, would be that result.

No costs allowed to either party.

I shall not charge the defendant with costs in this suit. The plaintiff claimed her dower, without offering or consenting to contribute to the discharge of the mortgage. Both parties have set up pretensions, that were not well founded, and it would be just, that each party should pay her own costs. At law, on a writ of right of dower, or on an assignment of dower, no costs are given, unless there be a deforcement, when the statute of *Gloucester* (which we have re-enacted) gave damages. But Lord *Thurlow* said, in *Lucas* v. *Calcroft*, (1 *Bro.* 134.) that in cases where there was an apportionment of dower by commissioners, and not by writ, costs were not given, unless the party was vexatious. And in *Curtis* v. *Curtis*, (*ubi supra*,) the Master of the Rolls held, that the widow had no costs where the heir threw no difficulties in the way. The right to costs must rest here, as in almost all other cases in this Court, on sound discretion.

Decree.

The following decree was entered: "*It is declared*, that the plaintiff is entitled to her dower in the messuage, dwelling house and land, in the bill mentioned, being ninety and an half acres; and she is entitled also, to one third part of the mesne profits of the premises, accrued since the death of her husband; and that her right is subject to a just and rateable contribution towards payment of the mortgage debt, in the pleadings mentioned. It is, thereupon, *ordered*, *&c.* that it be referred to one of the masters of this Court, to take an account of the rents and profits, (exclusive of the dwelling house, of which a proportionate part has been occupied by the plaintiff,) accrued since the husband's death, down to the date of the report, and which have been received by the defendant, or by any other person by her order, or for

her use, or which might have been received with ordinary care and diligence, and one third part of what shall be coming on said account of rents and profits, is to be paid by the defendant to the plaintiff, under the proviso and subject to the deduction of the value of the annuity herein after mentioned. That for the better taking the said account, the defendant is to produce before the master, upon oath, all deeds, writings, papers and books of account in her custody, or power, relating to the matters in question, and both parties are to be examined, as the master may direct; and the master is to make to both parties all just allowances: *And it is further ordered, &c.*, that the master ascertain the amount of principal and interest, (exclusive of costs,) due upon the mortgage, in the pleadings mentioned, and paid by the defendant, upon the redemption thereof, and the time when paid, and the amount of a year's interest on the aggregate sum of one third part of such principal and interest so paid by the defendant; and what would be the value, in a gross sum, upon the calculation of life annuities, and duly considering the age and health of the plaintiff, of such yearly interest, payable yearly, from the time of such payment, during the life of the plaintiff; and that the amount of such value, in a gross sum, be deducted from the amount of the one third part of the rents and profits to be ascertained, as belonging to the plaintiff as aforesaid; and if such value should equal the amount of the one third part of the said rents and profits, that in such case the one be set off against the other. But if such value should exceed the one third part of the rents and profits, then the excess be by the master deducted from the amount or value of the dower to be assigned, and that so much of the premises, as such excess shall, in the judgment of the master, amount to, (the land to be estimated according to its worth to the plaintiff, having a life estate therein,) be deducted from the one third part of the premises to be as-

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signed to the plaintiff: *And it is further ordered,* that the master assign to the plaintiff, by metes and bounds, her dower in the messuage or dwelling house, and ninety and an half acres of land aforesaid, after having deducted as aforesaid, from the quantity of land so to be assigned, as much as shall, in his judgment, be sufficient to satisfy the defendant what may remain due to her upon the value of the said annuity, after the one third of the rents and profits shall have been deducted as aforesaid: *And it is further ordered,* that no costs be recovered by either party, as against the other, and that the master be at liberty to apply for further directions, if necessary, upon the foot of this decree: *And it is further ordered,* that the defendant deliver possession to the plaintiff, of the lands and tenements, and of the part of the dwelling house, and messuage, with its appurtenances, which shall be so set out and assigned to the plaintiff for her dower; and that the tenants, if any, on the premises so to be assigned, attorn to and pay their rents to the plaintiff."

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EVERTSON and others *against* TAPPEN.

An account taken before a master, pursuant to an order of the Court, on petition of an executrix, when no suit was pending, is not binding on infant heirs, who may, on coming of age, file their bill for an account: But where the father and guardian of the infants attends in their behalf, before the master, in taking the account, it will not be opened, further than may be necessary to correct such errors as they may point out.

After the death of a testator, who had, in his life time, purchased land, and given a bond and mortgage for the purchase money, his widow, who was sole executrix, and empowered to sell the estate, to pay debts, &c., conveyed the equity of redemption to *S. M.* who gave his bond and mortgage for the same sum, which were accepted by the mortgagee, in lieu of the testator's bond and mortgage, which were given up and cancelled: *Held*, that the widow, in her account, as executrix, with the heirs, was not to be allowed the estimated value of her dower in the land, as the heirs derived no benefit whatever from the sale.

Where a widow and executrix was empowered to sell the real estate of the testator, to pay debts, and to release her dower on such sale, and retain the value thereof out of the proceeds: *Held*, that the dower was to be computed, according to the value of the property at the time of her husband's death.

An executrix suffered land, of which the testator died seised, subject to a mortgage, to be sold under the mortgage, and became the purchaser thereof, in her own right, and sold it: *Held*, that she was liable to account for the proceeds of the sale to the heirs; but that, as widow of the testator, she was entitled to her dower out of the proceeds, subject to her rateable contribution towards the extinguishment of the amount of the mortgage debt.

Where a testator devised to his wife the use and possession of all his estate, real and personal, during her natural life, or widowhood, and made her executrix: *Held*, that she was accountable to the heirs, for the use only of such part of the real estate, as the testator had acquired, after the date of the will; and that she was to be allowed, in her account, for so much of the rents and profits of such after acquired lands, as were applied by her towards the payment of the

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debts of the testator, after the personal estate had been applied for that purpose, and exhausted.

The estate of *C.* was directed to be sold, and the proceeds to be paid to *T.* in trust to pay incumbrances and expenses; and the residue in trust for the creditors of *C.*, and the *surplus* in trust for the wife of *T.* *T.* purchased in the whole estate at one bid, and by assuming to pay their debts, prevented the creditors of *C.* from bidding, and all competition at the sale, so that the real value of the estate, at auction, could not be ascertained, nor whether any, or what *surplus*, remained in trust for his wife, and *T.* continued to hold the estate exclusively as his own, until his death: *Held*, that the wife was entitled to consider the land, or so much thereof as remained unsold to pay the debts of *C.*, as her own, discharged from any claim of the husband or his heirs.

Compound interest is not allowed in favour of a trustee, though it is, sometimes, permitted against him, when he refuses to disclose the profits he has made out of the trust property.

Where the mother, as executrix, charges her children, being infant heirs, with board, clothing, &c. they are entitled to be allowed in account for the value of their labour and services.

March 29th, and *August* 18th.

PETER TAPPEN, grandfather of the plaintiffs, *John R. Evertson* and *Cornelia Evertson*, infants, by his last will, dated *February* 12th, 1776, devised the use and possession of all his estate, real and personal, to his wife, the defendant, during life, or widowhood; and after his death, to his three children, equally, in fee: He appointed the defendant *Elizabeth T.*, and his brother-in-law, *George Clinton*, his executors, whom he empowered to sell and dispose of all his real estate in fee, and apply the moneys for the uses mentioned in his will. The testator died in *September*, 1792.

At the date of the will, the testator had three children, *Cornelia*, the mother of the plaintiffs, *Catharine*, who married *Robert H. Livingston*, deceased, and *Peter M.*, who died under age, and without issue. After making his will, the testator had six other children, who are still living. *Cornelia*, the mother of the plaintiffs, died in 1808; and the plaintiffs, as her only representatives, were entitled to her share of her father's estate. In 1792, the defendant proved

the will, sued out letters testamentary, and took possession of all the property of the testator, with the books, &c.

The bill alleged, that no inventory of the property was filed by the defendant. That the defendant, in *March*, 1793, represented to the legislature, among other things, that the debts of the testator exceeded the value of the real and personal estate, owned by him at the time of making his will, and that contracts had been made by the testator, for the sale of parts of his real estate subsequently acquired, and for which conveyances had not been executed; and an act was passed, authorising the executors to perform those contracts, and to sell all or any of the real estate of the testator, whether acquired before or after making the will; and after paying his debts out of the proceeds, to put out the residue at interest, for the benefit of his heirs and devisees. That the testator left a large personal estate, more than sufficient to pay all his debts, and which the defendant has taken into her possession.

That in 1795, the defendant applied to the plaintiffs' mother and her sister, to release to the younger children of the testator, born after the will, a portion of his estate, promising, in consideration thereof, to divide all her own property, of every kind, between them and the younger children. That the said *Cornelia* and *Catharine*, and their husbands, accordingly, executed an agreement, dated *July* 20th, 1795, by which they released to the younger children, by name, six eighths of all the real estate of which the testator was seised at the date of his will; but that the defendant, so far from allowing the said *Cornelia*, or her children, the plaintiffs, to participate in the separate property of the defendant, has attempted, in various ways, to shift the estate of the testator, so as to make it appear to be her separate property.

That the defendant proposed to the said *Cornelia* and *Catharine*, and their husbands, and a younger daughter, who was of age, and her husband, to allow her to retain

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possession of all the estate of the testator, until the youngest of his children should come of age, without division, promising to manage it without loss or sacrifice, and to settle and divide it among all the children or their representatives, when the youngest child came of age, which would be in 1815; and they, therefore, on the 17th of *October*, 1799, executed a writing prepared by the defendant, authorising her to sell the store of the testator, and a lot of ground at the landing, and such other parts of the real estate, over and above what was necessary to pay the debts, as the executors should judge beneficial; and that no dividend should be made of the estate, in ten years from that date, if the defendant should live so long unmarried; and, in all cases, where sales had been, or should be made, and the defendant should release her dower, she might retain the value of it, out of the proceeds. That the said agreement was not intended to extinguish or compensate for any right of dower of the defendant, in lands previously sold; and that she did not claim dower in the store or land, before that time sold to *John Mott*. That the defendant, since the youngest child of the testator has come of age, has refused, and opposed the settlement and division of the estate.

That by an act of the legislature, passed *March* 22d, 1788, the commissioners of forfeitures for the *Middle District*, were authorised, on giving six weeks public notice, to sell all the real estate in *Poughkeepsie*, forfeited by the attainder of *Bartholomew Crannell*, and to pay the moneys arising from the sale, deducting ten pounds for commissions, to *Gilbert Livingston*, and *Peter Tappen*, the testator, (who had married daughters of *B. C.*) in trust, to be applied by them in payment of mortgages and incumbrances, and to reimburse themselves for advances, and the residue and the rents received by them, in trust to pay the creditors of *B. C.*, and if any surplus remained, then in trust for *Catharine L.* and *Elizabeth T.*, the wives of the said *G. L.* and *P. T.* in equal shares. That in 1788, the commission-

ers of forfeitures of the *Middle District*, sold all the real estate of *B. C.* in *P.*, forfeited by his attainder, as the same was pointed out by the said *G. L.* and *P. T.*, with the knowledge of their wives, and they the said *G. L.* and *P. T.* became the purchasers, and received the conveyances and covenanted for the payment of the purchase money according to the directions of the act. That the said *G. L.* and *P. T.*, and their wives, or some of them, as agents of *B. C.*, procured a valuation of the said estate, as having belonged to *B. C.* in fee; and for which they received a compensation from the *British* government. That *G. L.* and *P. T.* took possession of the estate so purchased, and occupied the same, as owners thereof in fee, and made partition thereof, and their wives joined in the deeds of confirmation and partition; and the said *G. L.* and *P. T.* afterwards possessed their respective shares, in severalty, according to the partition. That after the death of *P. T.*, the defendant took possession of the premises, under her authority derived from the will, &c. and as natural guardian to her younger children, always acknowledging the title of the testator, until the youngest child came of age, when she, for the first time, openly pretended, that *B. C.* never had any title to the premises, but that the same belonged to *T.*, his wife, one of the daughters of *Peter Van Kleeck*; and that she had conveyances for the same from her heirs.

That the testator was seised, at his death, of a moiety of lot No. 1. of the subdivision of great lot No. 2. in the *Hardenbergh* patent, containing 2,956 acres and an half, and the same being subject to a mortgage to the State, from the person from whom the title was derived, it was agreed between the defendant, and *G. L.* and *Daniel Monk*, who owned the other moiety, to permit the land to be sold under the mortgage, and to buy it in, in order to confirm the title. That in 1794, the land was sold under the mortgage, and the defendant, and the said *G. L.* and *D. M.*, became the purchasers, for about the amount of the mort-

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gage debt, and one moiety of the land was conveyed to the defendant, and the other moiety to *G. L.* and *D. M.* The plaintiffs alleged, that the defendant, by such purchase, became a trustee for the heirs of the testator, and could not, in equity, hold the land in her own right; but that the defendant has since set up a claim in her own right, and in 1806, sold the land to *P.* and *H. Ruggles*, for 5,000 dollars.

That the testator, and *G. L.*, and *Israel Smith*, owned the *Union* store and landing, in *Poughkeepsie*, with two or more sloops; *I. S.* died in 1791; and the testator, in 1792, purchased of the executors of *I. S.* his third of the said property for 2,500 dollars, for which he gave his bond, and a mortgage executed by himself, and the defendant, which remained unpaid at his death. That the defendant, after the death of the testator, agreed with *John Mott*, to give up the said purchase to him, if the executors of *I. S.* would accept him in the place of the defendant, and release the estate of the testator; and the executors of *I. S.*, having acceded to the proposal, the defendant, accordingly, conveyed the third part of the premises to *J. M.*, and the executors of *I. S.* gave up the bond of the testator. That the defendant claims interest on the one *third* of the sum of 2,500 dollars, as her dower, in the premises, from the time of the sale to *Mott*; but the bill charged, that she was not entitled to dower therein. That the defendant took possession of the other third of the premises, belonging to the estate of the testator, and held the same until 1799, when she sold the same to *George B. Evertson*, for 5,000 dollars, having, in the mean time, made great profits out of the stores, sloops, &c., for which she refused to account, claiming the same as her own.

That the testator was interested, in his own right, with *George Clinton* and others, in several tracts of land in the *Kayaderosseras* patent, parcels of which were sold by the testator, and bonds and mortgages taken from the purcha-

sers, and for other parts, contracts of sale were made. That the defendant has possessed herself of the bonds, mortgages, and contracts, and received moneys thereon, and for other parts of the land sold by her, for all which she refuses to account. That the testator died seised of five acres of land in *P.* on which there were several houses, on which the defendant has received the rents and profits; and has charged large sums for repairs and improvements, giving herself credit for the full third of the rents, with compound interest, for her dower, without making any deduction for expenditures.

That the defendant has possessed herself of a wood lot of twenty-one acres, in *Clinton*, of which the testator died seised, and has taken, and suffered others to take, large quantities of wood from the lot, for which she refuses to account.

That the testator died seised of other lands, in the counties of *Dutchess*, *Ulster*, *Montgomery*, *Clinton*, and elsewhere, the particulars of which are unknown to the plaintiffs, but of which the defendant has taken possession, with the title deeds, &c., and part of which she has sold, but refuses to account for the proceeds.

That in *February*, 1816, the defendant presented a petition to this Court, to have her accounts, in relation to the estate of the testator, referred to a master, and to have *George B. Evertson*, appointed guardian of the plaintiffs, to attend the hearing before the master. That on the 23d of *February*, 1816, this Court made an order, referring the accounts of the defendant to Mr. *Swift*, a master, and appointed *G. B. Evertson* guardian of the plaintiffs. That, at that time, there was no cause pending in this Court. That *G. B. E.*, on notice, attended before the master, several times, in the spring of 1816, and offered to go on with the accounting, if the books, accounts, &c. were placed in a situation in which he could examine them; but the defendant, refusing so to submit the books, &c. and being advised,

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that the proceedings were extra-judicial, and not binding on the plaintiffs, refused to attend further on the master, and produced no proofs. That *G. B. E.* did not, on the 10th of *February*, 1817, close his proof, or submit to the reference to the master. That on the 19th of *March*, 1816, the first day of the hearing before the master, the other children of the testator admitted, for the purpose of such reference, that the accounts of the defendant were correct, and that the estate of the testator was indebted to the defendant, in the sum of 25,400 dollars, on the 22d of *February*, 1813, without interest; and the six younger children confessed balances against them for board, to the amount of 8,000 dollars and upwards. The plaintiffs averred, that no such sum was due to the defendant; that her separate property, if any, was inconsiderable, and unproducive; and that she was in no business, and wholly depended on the estate of the testator for the support of herself and family. That the admissions above stated, were made without any examination. That on the 8th of *January*, 1818, the master made a report, certifying the sum of 4,341 dollars and 95 cents, to be due from the plaintiffs to the defendant, and chargeable on the one *eighth* of the estate belonging to the plaintiffs, and as being the amount expended by her, on account of the *eighth* part of the estate, over and above what she had received. The plaintiffs denied that any thing was due from them to the defendant; and alleged, that she was largely indebted to them. The plaintiffs stated various claims of the defendant before the master, and allowed by him, which they alleged to be unfounded and improper, and that the master had allowed *annual rests* in the account, thereby charging the plaintiffs a large sum for *compound interest*.

That the defendant had filed a bill in this Court, praying a sale of the interest of the plaintiffs, in the estate of the testator, for the purpose of paying her the amount so reported to be due to her from the plaintiffs; and had obtained from the other children of the testator, a written

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acknowledgment of the balance against them, and consenting to a sale of their interests. *Prayer*, that the defendant be directed to place her books of accounts, containing the original entries, &c., with a master, with the vouchers, so that the plaintiffs may examine the same; and that she produce and deposit the deeds and evidences in her power or possession, relative to the real estate of *P. T.*, and that she be decreed to come to an account with the plaintiffs, and to pay what may appear to be due to them, &c. and that the plaintiffs be let in to their share of the real estate; and for general relief.

The defendant, in her answer, admitted most of the facts stated in the bill. She admitted, that she took possession of all the property of the testator, but denied that she had concealed the books and accounts, &c., or had refused to account, and averred that she had fully accounted before the master, pursuant to an order of the Court, before the plaintiffs filed their bill. She denied that she refused to allow *G. B. E.*, as guardian of the plaintiffs, to examine the accounts, &c., but that she offered to permit him to examine them, at her house, in the presence of any witness he might select, but not to take the books and accounts into his own possession. She admitted that the testator died possessed of a large personal estate, consisting in vessels, stock in trade, farming utensils, debts, &c. which she took into her possession. That she made out an inventory of the personal estate, according to a schedule annexed to her answer, to which she also annexed a particular account of the amount of debts collected, proceeds of personal property sold, rents and profits of real estate received, &c. But she admitted, that she did not file the inventory, because she deemed it unnecessary, as she was entitled, by the will, to the use of the personal property during her life; and she averred, that she had given credit for the whole of it in her account, except the household furni-

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ture; and such parts of the furniture as were delivered to her daughters, were charged to them. She admitted the release of the 20th of *July*, 1795, stated by the plaintiffs, and alleged that it was made according to the known intentions of the testator, expressed a short time before his death, and which the parties believed to be fair and right. She denied that as a consideration for that release, she promised to divide her estate under the will, or give up her right of dower, or any estate in her own right; though she said at the time, that unless such release was executed, she should, by her will, so dispose of her own separate property, as to make all her children equal. That at the time of accounting before the master, she delivered to *G. B. E.* a copy of the release, and of all the papers, documents and accounts relating to the estate of *P. T.* which were requested. She admitted that she has never permitted the plaintiffs, or their mother, to participate in her own separate property, as a matter of right, and denied that her separate property was liable to any such demand from them, or her other children; but that she has charged to them in account, the various advances made to them. She denied that she had attempted to appropriate the property of the testator, in any such manner as suggested by the plaintiffs, or to make any part of it her own; and she alleged, that she had a large and just account against the estate of *P. T.* for advances made out of her own separate property, as would appear from the account annexed to her answer, which was a true statement of all charges against the estate, and of all credits to which it was entitled; and that she might receive the balance due to her, she had filed her bill in this Court, that so much of the real estate might be sold, as was sufficient for that purpose.

The defendant admitted, that *B. Crannel*, at the time of his attainder, as stated in the bill, was possessed of a considerable estate in *Poughkeepsie*, which she particularly set forth, of which he was seised in his own right, and part in

right of his wife, the mother of the defendant; and she insisted, that the interest of the wife of *B. C.* in the lots specified, was not subject to forfeiture on his conviction, and did not become vested in the State. She admitted, that the estate of *B. C.* was sold by the commissioners of forfeiture, to *G. L.* and *P. T.*, as stated in the bill, by deed dated *May* 30, 1788; but she did not know, nor did she believe, that *G. L.* and *P. T.* pointed out to the commissioners the lands so conveyed, as the estate of *B. C.* That the defendant and her sister *Catharine*, the wife of *G. L.*, had no agency or control over the purchase, so made by their husbands; and she insisted, that if any lands included in that deed, did not belong to *B. C.*, at the time of his attainder, and to which the defendant and her sister *C. L.* have acquired a title by descent or otherwise, they cannot justly be precluded from asserting their right. And the defendant stated and deduced the title, and insisted that she was seised, by descent and purchase, of two fifths, her sister *Catharine L.*, of one fifth, and her husband *Gilbert L.*, of one fifth, of all the estate of *Trientie*, the wife of *B. Crannel.* She stated, that until the plaintiffs commenced proceedings in partition, in 1813, she was not called upon to designate what property she held as executrix, and what in her own right; but after those proceedings had commenced, it became necessary for her to resist any claim, and to set up her own right. The defendant admitted the statement in the bill as to the *Union store, and landing, &c.* and insisted, that she was equitably entitled to her dower, in the one third sold to *Mott.* She denied that, at the time of executing the agreement of *October* 17, 1799, stated in the bill, she agreed to relinquish her dower in any of the lands of the testator, sold or unsold; or that she ever consented to a division of the estate, at any time, before her account was settled, and a sufficiency of the estate sold, to pay the balance due to her.

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The defendant then set forth the particulars as to the rest of the estate of the testator, but which it is unnecessary to state here. She admitted that the order of reference, &c., of *February* 23, 1816, was on her petition, and that no suit was then pending. That *George B. Evertson*, the father and guardian of the plaintiffs, attended in their behalf before the master, on the 17th of *March*, 1816, pursuant to notice, and continued to attend, on thirteen different days afterwards, and carefully investigated the accounts and vouchers exhibited by the defendant; and in the forenoon of the last day, he was told by the master, that the examination would be closed on that day, unless he had proofs to exhibit, but that he left the master, without requesting an adjournment, or expressing a determination to return; and did not again appear or exhibit any proofs. The defendant then set forth the particulars of the account before the master, &c., and insisted, that if there were any objections to the proceedings, or to the report of the master, they ought to have been made by way of exception.

Much evidence was taken on both sides, and the cause was brought to a hearing on the pleadings and proofs, (which were very voluminous,) on the 29th of *March*, 1821.

T. I. Oakley, for the plaintiffs, contended, that the plaintiffs were not in any manner concluded by the accounting before the master, there being, at that time, no suit pending in which they were parties. No decree can be had against infants, unless they have had a day in court, after coming of age, to show cause against it. (3 *Johns. Ch. Rep.* 368. 2 *P. Wm.* 387.)

That if the account taken before Mr. *Swift*, be not irregular and void; yet it ought to be opened, as it has been stated on erroneous principles, and great injustice has been done to the plaintiffs.

He then proceeded to state particularly how the new

account ought to be stated, as to all the different charges and credits.

P. Ruggles, contra, insisted, that the plaintiffs, having regularly attended, by their guardian, to the taking of the account before the master, had waived all objection to the formality of the proceeding; that they ought to be bound by the account, or to have made their objections to the master's report; but if the account should be opened, the examination ought to be confined to the particulars specified, and not extended to the whole account; and that all the costs ought to be paid by the plaintiffs.

That by the will of the testator, which gave the defendant "the use and possession of all his estate, real and personal, during her natural life," she was exempted from all liability to account to his heirs or devisees, for any personal property, owned or possessed by him at his death, whatever disposition she may have made of it. (6 *Cruise's Dig.* tit. *Devise, ch.* 34. s. 39. 1 *P. Wm.* 573. 575. 421. 424. 3 *Atk.* 175.)

That the agreement of the 17th of *October*, expressly provided that the defendant should retain her *dower* in the lands sold: and she was entitled to her dower in one third part of the store and landing sold to *Mott*. If land abide beneficially in the husband, but for a single moment, the wife is entitled to dower. (2 *Bl. Com.* 132. 1 *Cruise's Dig.* 141.)

That the pretended agreement of the 20th of *July*, is denied by the answer, and is not supported by any proof, except the testimony of *G. B. E.* the father and guardian of the plaintiffs, whose evidence was inadmissable. Besides, as a parol agreement, it was clearly void under the statute of frauds. (1 *Johns. Ch. Rep.* 339. 2 *Johns. Ch. Rep.* 554. and cases there cited.)

That by the act of the legislature of 1783, *Gilbert Livingston* and *P. T.*, the testator, were made *trustees* of the whole

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of *B. Crannel's* property in *Dutchess* county, which had been forfeited by the attainder; and for the *surplus* beyond what was necessary to pay the debts and expenses, they were trustees for the defendant and her sister *Catharine L.* That being trustees, they could not purchase for their own benefit. (1 *Mad. Ch.* 90, 91, 92. 377, 378. 1 *Johns. Ch. Rep.* 28. 36. 394. 2 *Johns. Ch. Rep.* 104. 257.) And the defendant, as *cestui que trust*, is now the equitable owner of all that part of the land in her possession. Where an estate is given to the husband, for the use of the wife, he is considered as a trustee for her, and technical words are not necessary. (3 *Atk.* 399. *Bumb. Rep.* 187. 2 *P. Wm.* 316.)

It is the duty of a trustee not to sell, until all due information is acquired by him for the benefit of the *cestui que trust.* (2 *Johns. Ch. Rep.* 110.) No lapse of time bars a direct trust. (3 *Johns. Ch. Rep.* 190. 216. 4 *Johns. Ch. Rep.* 136.)

That if the defendant was not entitled, as *cestui que trust*, to the lands in her possession, and which were included in the deed of the commissioners of forfeitures; she then claimed by descent from her mother, the wife of *B. C.*, and by purchase from her heirs, of several lots, which never vested in *B. C.*, and could not, therefore, be forfeited.

That the purchase of the lot in the *Hardenbergh* patent, was made by the defendant in her own right, and not as executrix or trustee, for the heirs of the testator. She could not have made the purchase for the heirs, without selling land to raise money for the purpose. The mortgage was not a debt due from the estate. If the bargain had proved disadvantageous, the heirs would have been under no obligation to take the lands. The defendant had a right to use the personal property of the testator as her own, if she paid the debts out of her own money. (3 *Johns. Ch. Rep.* 38. 252. 318. 1 *Saund.* 307. 1 *Madd. Ch.* 497. *Toller's L. of Ex.* 136.)

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THE CHANCELLOR. The account before the master was taken under an order of the 23d of *February*, 1816, made upon the petition of the defendant. There was no suit then pending, and the order was granted for her greater security and indemnity as executrix; it was not intended to be, and could not be, binding upon the infant plaintiffs, so as to exclude them, on coming of age, from calling her to account. But though it was an *ex parte* order, yet as the father of the infants attended before the master, as their guardian, during the whole protracted progress of the taking of the account, it does not seem to be necessary to open the account any further, than to correct such errors as have now been pointed out, on the part of the plaintiffs. I shall accordingly notice such objections as have been well taken, and state the principles upon which the account is to be restated.

Where on the petition of an executrix, when no suit was pending, an order was made, for taking an account before a master, the report of the master will not be binding on infant heirs, who may, on coming of age, file their bill for an account; but if the father and guardian of the infants has attended, in their behalf, before the master, the account will not be opened farther than may be necessary to correct such errors as they may point out.

Where the widow and executrix was empowered to sell real estate, and she released land charged with a mortgage, to satisfy the mortgage debt: Held, that the widow was not entitled to be allowed her dower, as the heir derived no benefit from the sale.

1. In the first place, the defendant is not entitled to dower in the undivided third part of the *Union* store and landing, which was purchased by her husband, *Peter Tappen*, of the executors of *Israel Smith*, deceased. This purchase was made by the husband in 1791, for 2,500 dollars, and he never paid any part of the consideration money; and on the 24th of *April*, 1793, the defendant and *George Clinton*, as executors of *Peter Tappen*, sold that right to *John Mott*, for the same sum, and his bond and mortgage to the executors of *Smith* was taken and received as a substitute for the debt which *Tappen* owed them on the original purchase. Whether the defendant has any subsisting right of dower against that property, in whose hands soever it may now be, is not the question before me, though I apprehend, that her deed as executrix, without any mention or reservation of that dower, would be a bar to such a claim. The only point now is, whether she has any claim in equity against the plaintiffs, for the estimated value of such a right of dower, supposing it to have existed before the deed to *Mott*; and there does not appear to me to be any colour for such

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claim. The heirs of *Tappen* received no benefit whatever from that sale. The entire proceeds of it were applied to extinguish the debt due from *Tappen*; and if the plaintiffs were to be charged with any portion of that dower, it would be a charge upon them without any equivalent or consideration. Nothing could be more unreasonable and unjust.

The agreement of the 17th of *October*, 1799, signed by the parent of the plaintiffs, was never intended to apply to such a case, but to cases where the proceeds of the sale belonged to the heirs as beneficial property, capable of being applied to their maintenance and education. They never meant to be charged with an equitable dower in the proceeds of any sale, when their ancestor owed the whole original consideration for the land, and the sale was made purposely to extinguish that debt, and left the purchase without any use or benefit to the heirs.

But the defendant is entitled to dower in all the other lands and real estate, whereof her husband died seised in his own right, or in the proceeds thereof, if sold. I say, *in his own right*, for, as I shall show hereafter, he did not die seised in his own right of the real estate acquired by purchase from the commissioners of forfeitures, under the act of the 22d of *March*, 1788. She is, therefore, entitled to dower in the proceeds of the sale of another third part of the *Union* store and landing, to *G. B. Evertson*, to be computed according to the rule prescribed in the agreement above referred to, of the 17th of *October*, 1799. The claim upon those proceeds must be confined to the sale of the real estate, and not extended to the sale of the vessels, and other personal property, (if any,) belonging to this store and landing, and which were sold together with the real estate, and for one aggregate price. And the value of the dower is to be computed, according to the value of the property at the death of the husband, and not accord-

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ing to its increased value afterwards, by reason of beneficial improvements made thereon. The defendant being executrix, and having the whole property in her possession, it was her own fault, and not that of the heirs, that the assignment of dower, if she wished it, was not made presently after her husband's death. She ought not to profit by such delay of her own, at the expense of the infant heirs.

An executrix suffered land, of which the testator died seised subject to a mortgage, to be sold under the mortgage, and became the purchaser, and sold it, as her property: Held, that she was liable to account to the heirs, for the proceeds; but she, as the widow, was entitled to her dower, subject to a rateable contribution towards the extinguishment of the mortgage debt.

The defendant being chargeable, as I shall presently show, with the proceeds of the land in the *Hardenbergh* patent, she is likewise entitled to dower in these proceeds, under the agreement already mentioned. But the dower in this case must be taken, subject to an equitable contribution, towards the extinguishment of the mortgage upon that land to the state treasurer, existing when her husband became the purchaser of an undivided moiety of that lot. To ascertain the amount of her contribution, as dowress, we must, according to the doctrine or rule in the case of *Swaine* v. *Perine*,* recently decided, take one third of a moiety of the principal and interest due on that mortgage, when paid, and charge her with the value of an annuity, payable yearly, for her life, of the interest upon the one third of that moiety, and that value to be computed upon the same principle, that the value of her dower, in the money arising from sales of the real estate, is to be computed.

*Ante, p. 482.

Devise to the wife, who was executrix, of the use and possession of all the estate, real and personal, of the testator, during her natural life: Held, that she was not accountable to the heirs for the use of the personal property, nor for the rents and profits of

2. The defendant is not accountable for the use of the personal estate left by her husband at his death, nor for the use of the real estate he owned, at the date of his will, as the use of all this was given to her by the will, nor for the use of the real estate purchased by her husband, as the confiscated property of *Bartholomew Crannel*. But she is to be held accountable for the use of the residue of the real estate, and for the proceeds of sales of the residue of the real estate, and she is to be credited for the appropriation

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of the rents and proceeds of that residue, towards the payment of debts remaining due, after the personal estate had been duly applied and exhausted. And, in order to show such due appropriation, she must of necessity account for the amount and disposition of the personal estate. She is likewise to be credited for all reasonable expenditures in the reparation and improvement of the residue of the real estate as above mentioned.

the real estate of which the testator was seised, at the date of his will, but only for the use of his after acquired real estate; and that she was to be allowed so much of the rents and profits, as were applied by her to the payment of debts, after the personal estate had been applied for that purpose, and exhausted.

3. The defendant is to be charged with the proceeds of the sale of the land in the *Hardenbergh* patent to *P.* and *H. Ruggles*. She purchased in this land at the sale under the mortgage, in order to deliver her husband's interest in that estate, which he had left at his death, from that incumbrance. Her husband, at his death, was seised of an equity of redemption in an undivided moiety of that lot; and she was his executrix with large powers as a trustee, and was the natural guardian of his infant children. It is impossible to permit such a trustee to buy in, under that incumbrance, for her own benefit. The principle of equity, on this point, is too well settled to be questioned; and the proof in the case is, that she bought, in her representative character, as executrix. She paid the purchase money, or what is the same thing in effect, she redeemed the mortgage, with the assets belonging to the estate. The evidence of this consists in the declarations which she made to *George B. Evertson*, and who appears to be a competent witness, and on the settlement which took place between her and Governor *Clinton*, her co-executor, and from whom she, in the first instance, borrowed the money to make the purchase. She signed the account in which that loan is charged to her *as executrix*.

An executor or trustee cannot buy in land of the testator, on a sale under an incumbrance, for his own benefit.

4. The defendant is not accountable, because she is entitled, in her own right, to all the real estate, not owned by her husband before that time, and purchased by him in conjunction with *Gilbert Livingston*, in 1788, or the forfeited estate of *B. Crannel*. The act of the 22d of *March*,

The estate of C. was directed to be sold, and the proceeds paid to T., in trust, to pay incumbrances and expenses, and the residue

1788, entitled, "An act directing the settlement of public accounts, and for other purposes therein mentioned," authorised and directed the sale of the confiscated estate of *Bartholomew Crannel*, in the town of *Poughkeepsie*, and the payment of the proceeds of the sale to *Gilbert Livingston* and *Peter Tappen*, in trust, to discharge incumbrances on the estate, and to reimburse themselves for expenses in buildings and repairs, and to hold the residue in trust, to pay the creditors of *Crannel*; and the overplus of those proceeds, if any, to hold in trust for the benefit of their wives *Catharine Livingston* and *Elizabeth Tappen*, in equal shares. It is in proof, that *Livingston* and *Tappen* purchased in, themselves, the whole estate, so sold, at one bid, and prevented the creditors of *Crannel* from bidding, by assuming beforehand to pay all the debts; and that they stifled all competition at the sale, so that the real value of that estate, at auction, could not be ascertained, nor whether any surplus, or what amount, would have remained in trust for their wives, if the sale had been left to have been made under the usual competition. It is impossible to know what amount of surplus the wives would have been entitled to; and I think the husbands cannot be permitted to derive any benefit by their interference, and the uncertainty which they produced, to the prejudice of the *cestui que trusts*. They elected, afterwards, to hold the estate so purchased in, as entirely and exclusively their own, and have destroyed all means of ascertaining the residuary interest of their wives. They have so confounded and mixed up that interest with their own, that a discrimination cannot be made; and upon just principles of equity, the wives are entitled to consider the land as theirs, discharged from the claims of the husbands.

It might have been deemed proper, that the amount of the debts so assumed by her husband, should have been charged to the defendant, for there never could have been any surplus

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to pay creditors of C., and the surplus in trust for the wife of T.; and T. purchased in the whole estate at one bid, and prevented the creditors of C. from bidding, by assuming to pay their debts, and stifled all competition at the sale, so that the real value of the estate at the auction, could not be ascertained, nor whether any surplus remained in trust for the wife; and T. continued to hold the estate exclusively as his own, until his death: Held, that the wife, who was executrix of T., was entitled to consider the land, or so much of it as remained unsold by T. for the payment of the debts of C., as her own, discharged from any claim of the husband or his heirs.

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without the previous payment of those debts. But it appears, that *Livingston* and *Tappen* sold parts of that real estate so purchased in, to near 3,800 dollars, to discharge the debts of *Crannel*; and the remainder of that real estate, remaining unsold at her husband's death, may well be considered as the proper *residuum* which was held in trust for the defendant.

The wood lot, of which so much was said by the witnesses, was included in the sale and deed given by the commissioners of forfeitures under the act, and purchased in by *Livingston* and *Tappen*, and was part of the trust property.

The defendant does not appear to me to be precluded from setting up her title to this property, as *cestui que trust*, under the act of the legislature, by the manner in which she has treated the property, since her husband's death. She was in possession of it, and not anticipating any controversy between her and her children, she may not have deemed it material to assert that title affirmatively. But when it does become material, she is not precluded or barred from asserting her title, either by the lapse of time, or by her silence, so long as she has not devested herself of her title by any legal act or deed.

The decision on this point renders it unnecessary to examine into the validity of the claim set up by the defendant to a part of the estate held under the purchase from the commissioners of forfeitures, as being derived from her mother, the wife of *Crannel*. I have no difficulty, however, in saying, that the claim is entirely destitute of foundation. *Crannel* acted as owner, for twenty years and upwards, before he left the state; and from that fact, and the removal and dispersion of the papers, during the revolutionary war, there is ground to presume a deed to him, and that the same has been lost or destroyed. That same property was confiscated and sold as his property, and treated as such by

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Livingston and *Tappen*, with the knowledge and acquiescence of the defendant and her sister, Mrs. *Livingston*, down to the death of *Peter Tappen*, in 1792. This property was appraised, after the revolutionary war, as the sole and absolute property of *Crannel*, when he left this state, and it was so designated and pointed out as his property, by *Livingston* and *Tappen*; and *Crannel*, in the life time of his wife, received compensation from the *British* government, on the foot of that appraisement. It is too late now for the defendant, as one of the heirs of *Crannel*, and as widow of *Tappen*, to set up a title to that property, as heir to her mother. And if this claim had any force or colour, yet the right of *Trientie*, the wife of *Crannel*, was clearly barred by the statute of limitations of the 28th of *March*, 1797, which barred all claims against forfeited estates, not asserted in five years; and *Trientie*, when that act was passed, was alive and a widow.

In reviewing the accounts, all charges and disbursements by the defendant, for reparation or improvement of the property so purchased, as the forfeited estate of *Crannel*, are of course to be disallowed; and she, also, is not to be charged with the rents and profits received by her from that land.

Compound interest is not allowed in favour of a trustee.

5. The annual rests, and the consequent allowance of compound interest to the defendant, must be omitted. This mode of computation is sometimes resorted to, in order to meet the profits, which the trustee may have made out of the trust property, and will not disclose; but it certainly cannot be allowed in favour of a trustee.

An executrix who charges her children, as infant heirs, with board, &c. must allow them for the value of their labour and services.

6. Allowance must likewise be made in favour of the plaintiffs, for what shall appear to the master to have been the value of the labour and services of the mother of the plaintiffs, while she lived in the family with the defendant; and this charge will form a reasonable set-off, as far it

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goes, to the charge for board and clothing of the plaintiffs' mother.

7. The defendant must be directed to deposit with the master, her books of accounts, documents, and original entries, relating to the matters in controversy, for the inspection of the plaintiffs, under the master's direction, and according to his discretion as to the time, mode and extent of the inspection, and the nature and kind of accounts, documents, entries and vouchers, to be so deposited.

8. In all other respects, the account already passed upon, and allowed by the master, is to be taken as correct, unless the plaintiffs shall be able to point out and satisfy the master of further mistakes therein; and so far as they shall be made to appear, they are to be corrected.

I shall direct a reference to a master, with special directions, according to this decree.

Decree accordingly.

D. THOMPSON *against* TAPPEN and Wife.

This Court cannot interfere with the law of descent of real property, or the established order of distribution of personal property, for the purpose of shifting the burden of paying the debts of the intestate, from the personal to the real estate, or to correct any alleged hardship or inequality produced by the law.

August 31*st.*

THE bill stated, that *James Thompson*, deceased, a brother of the plaintiff, came to the *United States*, an alien, in 1798, and was naturalized in 1813. That *Alexander Thompson*, deceased, a brother of the plaintiff, came to the *United States*, an alien, in 1801, and was naturalized in 1810. *That the plaintiff* came to the *United States* in 1804,

an alien, and still remains an alien. That *William Thompson*, a brother of the plaintiff, came to the *United States*, an alien, in 1816, and is still an alien. That *Ann*, a sister of the plaintiff, came to the *United States* an alien, in 1818 and still remains an alien. That *J.* and *A. Thompson*, in 1813, entered into partnership, as distillers, in *New-York*, and continued partners until the death of *Alexander T.* on the 30th of *January*, 1818. That while partners, they acquired a considerable estate, the greater part of which was vested in real property in their joint names. That they purchased in 1816, real property in *Cherry* and *Batavia* streets, including their distillery, and paid therefor 10,250, dollars, and took a deed in their joint names, and they borrowed from *John Pirnie*, money towards payment for the land in *Cherry* and *Batavia* streets, on their joint notes, and afterwards secured the payment thereof by a bond and mortgage. That in 1817, *J.* and *A. T.*, out of the profits of their joint concern, purchased another real estate in fee, in *Orange* and *Cross* streets, for which they paid 8,000 dollars, and upwards, and took a deed to them jointly, in fee. That *A. T.* died *intestate*, the 30th of *January*, 1818, leaving a wife still living, but no issue, and three brothers, (one of whom was the plaintiff,) and a sister. That the *plaintiff* and *James T.* then entered into, and continued their partnership, as distillers, until the death of *James T.*, on the 12th of *July*, 1818. That *James T.* died intestate, leaving *Sarah*, (defendant,) his widow, and leaving two children, and two brothers, (one of whom is the plaintiff,) and a sister. That administration of the goods of *Alexander T.*, was granted to his widow *and the plaintiff*. That the plaintiff acted faithfully as administrator, and also managed the estate of *James T.*, after his death, with the approbation of *Sarah* his widow, who was his administratrix. That *James* and *Alexander T.* on the 22d of *August*, 1817, in order to take up the notes given to *John*

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Pirnie, for moneys to pay for the lands in *Cherry* and *Batavia* streets, and for some other small sums due to him, gave him jointly, a bond and mortgage of the lands in *Orange* and *Cross* streets, to secure 4,500 dollars. That the plaintiff paid to *John P.* the interest of the mortgage. That the widow and children of *James Thompson*, claim not only their father's moiety, so purchased by *Alexander* and *James T.*, in the said real estate, but also, the moiety of *Alexander T.* in the said real estate, (as the plaintiff and his brother and sister are aliens,) subject to his widow's dower. *That the plaintiff is obliged to acquiesce in that claim.* That the defendant *Sarah*, also, insists, that the personal estate of *Alexander T.* shall be taken, and applied towards satisfaction of the bond and mortgage, so as to disencumber *the real* estate of the said *Alexander T.* in which the plaintiff and his brother and sister have no interest, but are excluded, because they are aliens; and which exclusion does not apply to the personal estate. That the plaintiff has adjusted the partnership concerns of *Alexander* and *James T.*, so far as to ascertain that whatever sum remains *in the hands of the plaintiff*, it is not sufficient to pay to the plaintiff, *William T.* his brother, and *Ann* his sister, and the widow of *Alexander*, *T.* their distributive shares of the personal estate of *Alexander T.*, after paying his debts, exclusive of the *bond and mortgage* debt aforesaid, which bond *ought to be paid by the persons entitled* to the *real estate of Alexander T.*, from which the plaintiff, and his brother and sister, are excluded. That the defendant is attempting, by a suit at law, to force the balance of the moneys of *Alexander T.* out of the hands of the plaintiff, to be applied towards payment of that bond to *John Pirnie*, and thereby applying the personal estate of *Alexander T.*, in which the plaintiff has an interest, to disencumber his real estate, in which the plaintiff has no interest; and the defendants have commenced an action against the plaintiff for such balance.

Prayer, for an injunction to stay the suit at law, and for general relief.

Bogardus, for the plaintiff, now moved for the injunction.

P. W. Radcliff, contra. He cited 3 *Johns. Ch. Rep.* 312. 257. 1 *P. Wm.* 291. 1 *Atk.* 487. 1 *Madd. Ch.* 477. 3 *P. Wm.* 359.

THE CHANCELLOR denied the motion, on the ground, that the established course of descent of the real estate, and the established order of distribution of the personal estate of *Alexander Thompson*, deceased, was not a sufficient reason for shifting the burden of paying his debts from the personal to the real estate. This Court cannot, he said, undertake to interfere with the law of descent, or to endeavour to correct what may be deemed its hardship or inequalities. The cases do not afford any such principle or precedent.

Motion denied.

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COSTER and others *against* MURRAY and MURRAY.

Where goods in which both parties were interested, were sent to the defendants, who agreed to be accountable for the share of the plaintiffs, or the proceeds thereof, and to charge no commission on the sale, *it seems* not to be "a trade of merchandise, between merchant and merchant," within the meaning of the exception in the statute of limitations. [*Sess.* 24 *ch.* 183. s. 5. 1 *N. R. L.* 184.]

The defendants, in such case, are considered as trustees or gratuitous bailees for the plaintiffs; and the statute of limitations does not apply to a direct trust, as between the trustee and *cestui que trust*; nor to parties standing in relation of principal and agent or factor, and not in the proper relation of debtor and creditor, or of joint partners in trade.

Whether the exception in the statute does not apply to other persons than merchants? *Quere.*

Whether even *open* accounts between *merchants*, where the last item is above six years standing, are not within the statute of limitations? *Quere.*

If part of an open current account be within six years, it draws after it items beyond six years, so as to protect them from the statute.

To bring a case within the exception, there must be mutual accounts between the parties. Where all the items are on one side, the last item, though within six years, does not draw after it those of longer standing.

Nov 12th, and *December* 10th.

THE bill, (filed *June* 23d, 1821,) stated, that the plaintiffs were assignees of the *Columbian Insurance Company*, which company, on the 2d of *April*, 1810, insured for the house of *T. S. Clarkson & Co.* 10,000 dollars, on sugars, on board of the ship *Egeria*, belonging to the defendants, on a voyage from *New-York* to *Russia*. The voyage was broken up at *Copenhagen*, and the cargo abandoned to the insurers, who paid the loss; and the property was assigned to them on the 23d of *May*, 1811. The sugars were sold, and the proceeds of them received by *George Dickenson*, agent of the insu-

sers, at *Copenhagen*. In the summer of 1813, *D.* as agent of the insurers, and the defendant *James B. M.* as agent of the defendants, made a joint purchase of linens at *Copenhagen*. *D.* paid one *third* of the price out of the proceeds of the sugars; and it was agreed that the linens should be shipped on joint account of the principals of the two agents, and that the plaintiffs should be entitled to one third of the proceeds; and that if the sale of the linens was made by the defendants, no commission should be charged on such sale. *James B. M.*, on the 7th of *July*, 1813, wrote a letter to *D.*, admitting the interest of the plaintiffs to one third of the linens, and the net proceeds thereof, and they to be chargeable with one third of the expenses, but with no commissions, if the linens were sold by the defendants. The linens were shipped from *Copenhagen* by the defendants, or under the direction of *James B. M.*, for and on their behalf, to the *U. S.*, and came to the defendants, who sold them, received the proceeds, and mingled the moneys so arising from the sale, with their own money. The *Columbian Insurance Company* became insolvent, and the plaintiffs were appointed assignees on the 22d of *May*, 1813. *D.*, in the spring of 1814, delivered to the plaintiffs an order on the defendants for one third of the linens, or the proceeds, &c. The defendants admitted to the plaintiffs, that they had the proceeds, and furnished the plaintiffs with an account thereof. The bill alleged, that the defendants, in their account, charged expenses, which were unwarrantable, such as 1,000 dollars for insurance, and 1,153 dollars for commissions, and refused to account for the one third of the proceeds, unless those charges were allowed.

The defendants put in a plea of the statute of limitations, and an answer denying any promise to pay within six years.

November 12th. The cause was heard on the pleadings.

H. Sedgwick, for the defendants. He cited 2 *Saund.* 127.

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note. 2 *Johns. Rep.* 200. 6 *Vesey*, 580. 586. 15 *Vesey*, 198. 18 *Vesey*, 286. 1 *Merivale's Rep.* 498. 3 *Tyng's Mass. Rep.* 201.

G. Griffin, contra. He cited 1 *Vernon*, 456. 3 *Bro. C. C.* 633. 639. *note.* 3 *Atk.* 105. 2 *Vesey, jun.* 280. 572. 582, 583. 10 *Vesey*, 466, 467. 2 *Freeman's Rep.* 22.

THE CHANCELLOR. It has been contended, on the part of the plaintiffs,

1. That this case came within the exception in the statute of limitations, as being an action "which concerned the trade of merchandize, between merchant and merchant, their factors or servants;" and,

2. That the claim contained in the bill, related to the execution of a trust, and, therefore, was not within the statute.

1. To bring a case within the exception in the statute, there must be mutual accounts, and reciprocal demands between two persons. This was so ruled by Mr. J. *Denison*, in *Cotes* v. *Harris*. (*Buller's N. P.* 149. 150.) Lord *Kenyon* said, afterwards, (*Peake's N. P.* 121 and 6 *Term Rep.* 193) that he took a note in that case, and furnished it for publication, and that *Denison*, J. was well acquainted with the import of the statute, and said, that where all the items were on one side, the last item, though within six years, did not draw after it those of a longer standing. There must be mutual accounts.

In the present case, there was no account current between the parties. There are no mutual and reciprocal demands. The demand is all on one side, except it be the charge of expenses and commissions incident to the very subject matter in question; and I should much doubt whether this made it a case of mutual accounts within the meaning of the exception. The defendants took charge of, and agreed to be accountable for, some goods, or the proceeds thereof, in which the parties had a joint interest; and,

as concerns these parties, and as between them, this hardly seems to be a "trade of merchandize between merchant and merchant." Possibly, however, that is not necessary, as Lord *Kenyon* has ruled, *(Peake's N. P.* 122.) that the exception extended to other persons than merchants.

But if it were admitted to be a case of merchandize, between merchant and merchant, yet the sale of the goods, and the receipt of the proceeds by the defendants, and their accountability for them, were all prior to six years before filing the bill, and it becomes a very serious question whether the statute does not apply to such a case. The question has been much discussed, and given rise to contradictory opinions and decisions, and seems not to be definitively settled at *Westminster Hall*, even to this day.

It has been contended on one side, that the exception in the statute of limitations, expressly, and without any qualification, excludes merchant's accounts, and that if it appears in the case, that the action concerned the trade of merchandize between merchant and merchant, no length of time was a bar, as the exception in the statute prevented its application absolutely to such a case.

The case of *Sandys* v. *Bladwell*, (Sir *William Jones*, 401.) contains an observation to that effect. An account was made between *F.* and *B.*, both merchants, and *B.* acknowleged 1,200 pounds due, and *F.* claimed more, and before the whole account was finished, *F.* died. His executor filed a bill against *B.*, who pleaded the statute of limitations; and *Jones*, *Cooke* and *Barkeley*, justices, to whom it was referred from Chancery, certified it was no bar, because the account was not ended, and because it was between merchants.

The last ground taken by the judges of the K. B., in this case, viz. *because it was between merchants*, goes to prove that matters of merchandize, between merchants, were not within the statute of limitations. But this whole case is too loose and concise to be of much authority, and

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there is another ground mentioned in the case, which might have been sufficient to support the opinion of common law judges, viz. that *the account was not ended.* It was an open current account, and part of it might have been within the six years. There are much weightier authorities in support of this side of the question. Thus, Lord *Hardwicke*, on the 9th of *July*, 1737, according to a case referred to by Lord *Eldon*, in 19 *Vesey*, 180. said, that the exception, as to merchants' accounts, is not to be confined to open accounts merely, for between common persons, so long as the account is continued, the statute does not bar. The exception, therefore, he said, must mean something more; and he seemed to think that *between merchants*, an open account would do, though there had been no dealing within six years. So, also, in *Catlin* v. *Skoulding*, (6 *Term*, 189.) Lord *Kenyon* observed, that where there was no item of account at all within six years, the plea would bar, unless the plaintiff could bring his case within the exception concerning *merchants' accounts*, and then the plaintiff is not bound, though there be no transaction of any kind between the parties for six years. These observations of the chief justice were, however, rather extra judicial, for in that case, there were credits on each side within six years, so as to render it a current and open account.

On the other side, there is a class of cases, which go to show, that the exception in the statute of limitations extends, even as to merchants' accounts, *only* to cases in which there had been some transactions within six years. In such cases, the items within the time, will draw to them and protect all the prior items in an open and running account, though reaching beyond the six years. There are several pretty strong cases, and some adjudications on the point.

In *Webber* v. *Tivill*, (2 *Saund.* 124.) the suit was *assumpsit*, by a merchant against a merchant, and a plea of the statute of limitations. The replication averred, that the promises arose on trade, between merchant and mer-

chant, concerning merchandize; and, on demurrer, judgment was rendered for the defendant. It was declared, that the statute intended only to except accounts open or current, between merchants, and not accounts stated between them, though the counsel for the plaintiff pressed the position, that actions concerning merchandize were absolutely excepted. The next case arose on the equity side of the Exchequer, in *Bridges* v. *Mitchell*: (*Gilb. Eq. Rep.* 224. 12 *G.* 1.) that was a bill by one merchant against another for an account, and a plea of the statute of limitations. The Court held the plea to be good, and said, that the statute had always been construed to except open accounts between merchant and merchant, but if the open accounts be by subsequent acts continued, they are not bound; but if such accounts be by the plaintiff deserted, then they are barred. In *Welford* v. *Liddel*, (2 *Vesey*, 400.) there was a bill for an account, and a plea of the statute. It was for an account concerning transactions between the plaintiff and his deceased father. The case does not state, whether the account concerned merchandize between merchant and merchant; but Lord *Hardwicke* goes on to observe, that "It was a pretty difficult construction here to apply that exception in the statute, relating to merchants' accounts. It is not, that the defendant may not plead the statute in all cases, where the account is closed and concluded between the parties, and the dealing and transaction over. It was not the meaning to hinder *that*; but it was to prevent dividing the account between merchants, where it was a running account, when, perhaps, part might have begun long before, and the account never settled, and perhaps there might have been dealings and transactions within the time of the statute." He accordingly allowed the plea. This opinion is not to be reconciled with the prior doctrine of Lord *Hardwicke*, already referred to, and the two decisions seem to contain directly opposite constructions of the statute.

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The case of *Martin* v. *Heathcote*, before Lord *Northington*, (2 *Eden*, 169.) is a decision in conformity with this last opinion of Lord *H.* It was a bill for an account of mercantile transactions; and the defendant, in his answer, set up the statute of limitations. The Chancellor observed, that "merchants' accounts, after six years total discontinuance of dealings, were as much within the statute as other accounts. The difference was, that a continuance afterwards, would prevent the statute running against merchants' accounts, *but would be a bar as to all articles before six years in other accounts.*"

We come next to the decision of Lord *Rosslyn*, in *Crawford* v. *Liddell*, in 1796, which appears to be also directly in point, if we may rely upon an imperfect note of the case, as cited by the counsel, in *Jones* v. *Pengree*, 6 *Vesey*, 580. It was a bill for an account, and a plea of the statute, with an averment, that it was not a merchant's account. The Lord Chancellor held, that the meaning of the exception in the statute was, that if any transactions between the parties took place within six years, none of the transactions should be barred; but that when all the transactions were over six years, the statute might be pleaded, as well to merchants' accounts as others; and the plea was allowed. This opinion was in accordance with the prior decision of Lord *Northington*.

But, notwithstanding these several strong opinions and decisions, the question was not considered as settled; and the facts in the cases cited were, perhaps, viewed as not bringing up the very point now under discussion. In *Jones* v. *Pengree* (6 *Vesey*, 580.) the same question was raised and discussed, and most of the cases on the point cited. But the cause went off on another point, and no opinion was expressed by Lord *Eldon* on the question. The same thing may be said of the case of *Duff* v. *East India Company*, (15 *Vesey*, 198.) where the question was very fully discussed, and treated as an open question The two points raised,

were, whether a demand, upon a single transaction of sale between merchant and factor, was within the exception as to merchants' accounts, in the statute of limitations; and whether the exception applied to merchants' accounts generally, or to those only with items continuing within six years. The counsel for the defendants asserted, that there was *no instance* of an account between merchants closed for six years, that had been treated as open and continuing, and as within the exception, and such an instance, in that commercial country, ought to have been shown on the other side. They contended, that merchants were peculiarly liable to loss of vouchers, and ought to be protected by the statute equally with other persons, and that to exclude merchants' accounts altogether, and to hold it immaterial whether the account was continuing, or the parties had ceased to be merchants for forty years, would render the statute useless, and be very inconvenient.

The Master of the Rolls decided the cause on other grounds, and took no notice of this point.

In *Barber* v. *Barber*, (18 *Vesey*, 286.) the question was again brought before Sir *Wm. Grant*, the master of the rolls. It was a bill for an account against the representatives of a surviving partner, and a plea of the statute of limitations. The counsel on one side contended, that, as all dealings had ceased above six years, the statute was a bar to merchants' accounts, and the counsel on the other side insisted, that merchants' accounts were excepted by the words of the statute. It was decided that the case was within the statute, as all accounts had ceased for six years.

This case would seem to have been sufficient to have ended, forever, all further agitation of this old and vexed question. But afterwards, in *Foster* v. *Hodgson*, (19 *Vesey*, 180.) the very same point came again before Lord *Eldon*. It was a bill upon an open and running account, The defendant was a banker and the plaintiff a merchant. There was no settlement or demand for 12 years, and a demurrer was

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put in, founded upon the statute of limitations. The statute was pressed, and among others, by Sir *Samuel Romilly*, the very distinguished counsel, who had contended for the application of the statute in all the other cases, which have been cited from the younger *Vesey*. It was observed, that a notion had prevailed that, by the effect of the exception in the statute, there was no limitation to a suit upon merchants' accounts, but that the meaning was, that if the last item of the account was within six years, that preserves all the preceding items of debt and credit from the operation of the statute. Lord *Eldon* said, that the bill had no allegation that the foundation of the suit was accounts relative to *merchandise between merchant* and *merchant*. He did not, therefore, decide the question, though he took notice of the conflicting decisions, and observed, that the case in 1 *Vernon*, 474. that the statute was no bar to an open account, was overruled by Lord *Talbot*, who held, that an open account was within the statute, unless some item of charge and debit was within six years. He further observed, that the doctrine upon the question, whether the same law that applies to *open accounts* applied also to *merchants' accounts*, was not to be reconciled.

Thus stands this question upon the *English* authorities, It still remains to be definitively settled, though I think the weight of authority is much in favour of the application of the statute to open merchants' accounts, when the item is above six years before the commencement of the suit; and it is rather surprising, that Lord *Eldon* should consider the point as still unsettled, after the decisions of Lord *Northington*, Lord *Rosslyn*, and Sir *Wm. Grant*. In *Ranchander* v. *Hammond*, (2 *Johns. Rep.* 200.) our Supreme Court considered, that the *English* decisions applied entirely to our statute, notwithstanding some slight variation in the phraseology of the act; and that the exception in the act applied only to open and current accounts,

end not to accounts stated. But whether some part of an open current account must fall within the six years, to bring the case within the exception, is a distinct question, not hitherto decided in our Courts. It is only settled, that if part of an open current account be within six years, that part draws after it the articles beyond six years, so as to protect them from the statute. The cases cited assume this rule, and it was so decided also in *Cogswell* v. *Dolliver*, 2 *Mass. Term Rep.* 217.

Assuming the case before me to be one that concerned the trade of merchandize between merchant and merchant, I should rather be inclined to think the statute was well pleaded, and that the case did not fall within the exception. It is not, however, necessary to give any decided opinion on the question, because the case does not require it, as it seems not to be a case of mutual accounts, and so not within the exception. But as the general question was made a point upon the argument, and as it is not altogether settled, whether such a case as the one presented by the pleadings, might not be deemed to fall within the exception to the statute, I thought it would be useful to review the principal cases on this much litigated subject.

2. The other ground, taken by the plaintiff's counsel, appears to me to be decisive, in their favour, and to take the case out of the statute, without having recourse to a *proviso*, which, if originally clear upon the text itself, has been rendered perplexed and litigious, by the commentaries of counsel, and the contradictory doubts and decisions of Courts.

If there was a trust created in the defendants, to account as agents or trustees, for these goods, or the avails thereof, the case is not within the statute, for that does not reach to matters of direct trust, as between trustee and *cestui que trust*. (*Vide* the cases referred to in 1 *Eq. Cas. Abr.* 303. A. and 3 *Johns. Ch. Rep.* 216. 222.) It appears very clearly, that here was a trust, a deposit to be accounted for.

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The defendants assumed the charge and direction of the goods in which the *Columbian Insurance Company* had an interest to one third part. They became the agents or factors of the company, as to the amount of their interest, and were entitled to their reimbursement and indemnity for all charges and expenses incurred by them in the execution of the trust. The defendants were to have no commissions if they sold the goods, and the deposit with them was in the nature of a gratuitous bailment or trust. The parties were not partners, and accountable for each others acts. They had respectively their *aliquot* shares of the cargo, shipped by the defendants from *Copenhagen*, and the latter had the possession and control of the entire interest of both parties, and assumedthe direction and disposition of the whole, and were to account to the company for their proportion of the proceeds. This was a plain case of trust. The parties stood not in the relation of debtor and creditor, or of joint partners in trade, but in the relation of agent or factor and principal, and the statute of limitations does not apply to the case. In *Godfrey* v. *Saunders*, (3 *Wils.* 94.) the defendant was sued in an action of account, as factor He plead the statute of limitations, that there was not any open account between them within six years. The plaintiff replied, that he was a merchant, and the defendant his factor, and *had the care of goods to render an account*, and that the account concerned trade and merchand ze, and was never adjusted. The defendant rejoined, that the account did not concern trade and merchandize. Upon the trial, this issue was given up by the defendant's counsel, and the jury found for the plaintiff, and there was a judgment *quod computet*. This is a case showing clearly, that a factor is responsible upon an open account, though not within six years. So in *Stiles* v. *Donaldson*, (2 *Dallas*, 264.) the defendant set off against a bond an unliquidated account between him and the plaintiff, con-

cerning the sale of goods by the plaintiff as agent and factor for the defendant. And though the plaintiff objected to the proof of the set off, on the ground, that the statute of limitations was a positive bar, as there was a lapse of 17 years since the date of the last item of the account, yet the evidence was admitted, and the decision of the Court of Common Pleas of *Philadelphia*, was affirmed on error to the Supreme Court, on the ground, that the accounts were not within the act of limitations. It is an anciently settled rule, (1 *Ch. Ca.* 20. 3 *Ch. Rep.* 5.) that if one person receives money in trust for another, he cannot plead the statute in bar of an account. In *Hollis'* case, (2 *Vent.* 345.) money was lent to *B.*, to be disposed of as *A.* should direct, and it was held, that this was a *depositum*, and a trust to *A.*, and the statute could not be plead. The present is as strong a case of trust, as any that have been alluded to. The defendants take the plaintiffs' goods, to account for them without commission, and they convert the goods into cash, and receive the proceeds, and now set up the statute. Under the circumstances of the case, as admitted by the plea, there cannot well be conceived a grosser breach of trust, and of the obligations of good faith.

I shall, accordingly, on this second ground, overrule the plea, and reserve the question of costs, until the final hearing, and direct the defendants to answer in four weeks, after service upon their solicitor of a copy of this order.

Order accordingly.

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S. MASON *against* ROOSEVELT and others.

Where an *administratrix*, a few days after the death of the intestate, committed the entire possession and management of the estate to *R.*, to whom she gave a power of attorney to collect debts, &c. *Held*, that *R.*, who admitted that he accepted the agency from motives of benevolence, as a friend and relation of the family, was not entitled to *commissions*, on the moneys received and paid by him, nor any allowance for his services in relation to the estate.

Such an agent, however, is not chargeable with *interest* on moneys belonging to the estate, received by him, under the directions of the administratrix.

Aliter, where he assumes to act as guardian to the infant heirs, and receives the rents and profits of the real estate.

Whether on a bill filed by a creditor for an account, a master, on an order of reference to him, to take the account, can charge the debtor with *interest*, except on debts which would carry interest in a Court of law? *Quere.*

On a bill, filed by the heirs of the intestate against *R.* agent of the administratrix, for an account, the testimony of the administratrix, who had been released by the plaintiff, is not, of itself, sufficient against the answer of the defendant.

It *seems*, that a release of the administratrix, as principal, in such case, would be a discharge also of the defendant as her agent.

THIS was a *rehearing* on the *petition*, in the matter of the heirs of *Samuel Nicoll*, deceased, to be let in to prove their debts against the estate of *C. C. Roosevelt*, deceased, on taking the account before the master, in the above cause, on exceptions taken to the master's report.

The bill, in this cause, was filed on the 10th of *December*, 1817, by the plaintiff, for herself, as creditor, and such other creditors of *C. C. Roosevelt*, deceased, as should come in, &c. against the executors, heirs and devisees of *C. C. R.*, for an account of the personal estate, and for a sale of his estate, and payment of their demands.

An order of reference to a master to take and state an

account of the real and personal estate of the intestate, and of the debts due, was entered on the 30th of *June*, 1818; and the master made his report on the 20th of *October*, 1818.

The petitioners, on the 30th of *November*, 1818, obtained an order, on an *ex parte* hearing, admitting them, as parties, to appear before the master, and prove their accounts and demands against the estate of *C. C. R.*

It appeared, that prior to this order, the heirs of *Nicoll* had, on the 4th of *April*, 1812, filed their bill against *C. C. R.* for an account of the rents and profits of the real estate of *N.*, and the proceeds of certain parts of the real and personal estate, which had come to his hands, as guardian of the heirs, or otherwise, in their right and behalf, and in right of the widow of *N.*, who had been appointed administratrix of the estate of her husband, and who afterwards intermarried with *P R. Ludlow;* and she and her husband were made defendants. The heirs of *N.*, in their bill, charged, that the widow of *N.* administered on his estate, the 6th of *February*, 1796, four days after his decease, and then committed the entire possession and management thereof to *C. C. R.*, and gave him a power of attorney for that purpose. That before *May*, 1796, *C. C. R.* became guardian to the infant children of the intestate, and in that character, received large sums of money out of the rents and profits, and from sales of parts of the real estate. That on the 12th of *October*, 1796, he applied to the Court of Probate, for a sale of the real estate of the intestate, and under an order of that Court, sold large parcels of the real estate. That the widow and administratrix, having confided to him the whole management of the estate, broke up housekeeping, in *May*, 1796; and afterwards, in *December*, 1803, married *P. R. Ludlow*.

The bill *prayed* for a discovery, and account, &c.

C. C. R., on the 27th of *August*, 1812, filed his answer

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to that bill, and admitted, that he was a friend and relative of the family of *N*, and undertook the agency of the estate as charged in the bill, at the request of the widow and administratrix, from motives of humanity and benevolence, and with reluctance. That on the 17th of *May*, 1796, the administratrix executed a power of attorney to him, and three others, jointly and severally, to sue for and collect the debts due to the estate. That he was never appointed guardian of the children of *N*., and never acted as such. That at the request of the administratrix, and as her attorney in fact, and friend of the family, he received and paid moneys, as set forth in a schedule annexed to his answer. That he took possession of certain title deeds, at the request of the administratrix, and subject to her control, and which he set forth in his answer. That under the power of attorney, he received the rents and profits of the real estate, and part of the proceeds of the sale of the real and personal estate; a true account of which receipts, and of his disbursements, &c. and of the balance in his hands, was contained in the schedule annexed. He denied that he ever applied to the Court of Probates, for an order to sell the real estate, or that he sold any part thereof, except as stated in the schedule to which he referred. He admitted, that the administratrix had obtained from the Court of Probates an order for such sale, and did sell part of the real estate; but his memory being impaired by disease, he could not answer more fully. He admitted, that in 1796, he received from *Elbert R.*, 2,125 dollars; and in 1810, he received from *E. R.* 4,025 dollars, and 3,000 dollars from *G. W. Lent*, for sales of the real estate, by direction of the administratrix. That he disposed of these sums according to the directions of the administratrix; and the schedule annexed contained a true account of all his concerns with the estate of *N*. That he kept no regular books of accounts of his transactions relative to the estate;

and acted merely as agent of the administratrix, and appropriated the moneys received by him, according to her directions, except as to the balance remaining in hand. That he had always been ready to account, and to pay the balance.

No replication was filed to this answer, and *C. C. R.* died about eighteen months after, and no further proceedings after his answer, appeared in the cause.

It appeared also, that on the 5th of *July*, 1816, the heirs of *N.* filed a new original bill against the executors and legal representatives of *C. C. R.*, to which the defendants pleaded the fact of the former suit in bar; and the plea was sustained by the judgment of the Court upon it, the 14th of *October*, 1817.*

* Vide 3 *Johns. Ch. Rep.* 60.

On the 11th of *December*, 1818, the plaintiff and defendants in the present suit, and the heirs of *Nicoll*, under the order of the 30th of *November*, 1818, appeared by their respective counsel, before the master, to whom the reference had been made, to take the account. The counsel for the plaintiff, and for the representatives of *C. C. R.*, objected to the heirs of *Nicoll* proceeding to take the account, on the ground, that after the decision of the Court on the plea, in *October*, 1817, they should have filed their *bill of revivor* against the representatives of *C. C. R.*

The counsel for the parties in this suit, and petitioners, then agreed, that the proceedings before the master should be considered as had on a bill of *revivor* of the original suit above mentioned. And it was then insisted, that the petitioners' claim must be confined to the balance, as stated in the schedule annexed to the answer of *C. C. R.* in that suit, unless the petitioners could surcharge and falsify that account; but the master permitted them to proceed, as if no such accounts had been rendered. On the 24th of *November*, 1819, the master filed his report of the amount due to the heirs of *Nicoll*.

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The petitioners and the defendants both filed exceptions to the report.

March 7th, 1820. After a hearing of the counsel on these exceptions, the Chancellor overruled all the exceptions taken on the part of the petitioners, and the *second* and *third* exceptions taken by the defendants to the report, which were, 2. That *C. C. R.* was entitled to *commissions*. 3. That *C. C. R.* was not chargeable with *interest*.

In *May*, 1821, the defendants, executors of *C. C. R.*, presented a petition for a rehearing, against so much of the decretal order of *March*, 1820, as overruled the *exceptions* taken by them to the master's report; and the Court granted a rehearing.

November 10th, 1821. The cause came on to be heard on the exceptions, taken by the defendants to the master's report.

Boyd and *T. A. Emmet*, in support of the exceptions, argued:

1. That the answer of *C. C. R.* not having been put in issue by a replication, and no proceedings had in the cause after the same was filed, it was not competent to the heirs of *N.* to open the account, unless *C. C. R.* was to be charged with fraud, or mistake, neither of which was pretended.

2. That if the answer was to be considered as put at issue, then there was no testimony before the master to countervail it.

3. That on proof of a debt on a creditor's bill, *interest* is never allowed, on an *open account*, or on any item of charge, where interest is not reserved; and the following authorities were cited. 1 *Vesey, jun.* 426. 3 *Atk.* 273. 4 *Vesey*, 620. 14 *Vesey*, 509. 2 *Vesey, jun.* 157. 165.

Dickens, 139. 308. 428. 1 *Madd. Ch.* 428. 489. 491. 12 *Vesey*, 129. 2 *Atk.* 440. 603. 8 *Vesey*, 48.

4. That *C. C. R.* acted as agent or attorney of the administratrix of Dr. *Nicoll*; and, as such, was only liable for interest in case he had neglected to lay out money according to direction; or refused to account when called upon to account. 3 *Bro. C. C.* 107. *Prec. in Ch.* 254. *Eq. Cas. Abr.* 125.

5. To allow the petitioners interest, would be doing injustice to other creditors, as the estate is insolvent, and the petitioners have been guilty of great *laches*. *Mitf. Pl.* 201. 210. 3 *Atk.* 309. 2 *Atk.* 252. 2 *Vesey*, 239. 1 *Sch.* and *Lef.* 192.

6. That *C. C. R.* was entitled to commissions. 1 *Vesey*, 115.

D. S. Jones, contra, contended, 1. That no *commissions* ought to be allowed. It is not pretended, that there was any agreement between *C. C. R.* and the administratrix, for commissions. The administratrix herself, had no right to make such a charge; *a fortiori*, her agent could not be entitled to make it, especially as he put his agency altogether on the ground of friendship and benevolence.

2. As to the *interest*, he contended, that it was a legal and just charge against *C. C. R.* As trustee and guardian, he ought to have kept the monies of the estate separate from his own. It appeared that he neglected to pay off the debts of the estate when he had funds in his hands, and when he knew that those debts carried interest. It would appear from an examination of the accounts, that he had a large balance of money in his hands, from year to year, belonging to the estate, and he is not to be considered in the light of a mere agent or broker. He had the entire management and control of the estate; he acted as a principal, and paid money when, and to whom, he pleased. There is no evidence of

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his having paid any debt by direction of the administratrix.

The answer of *C. C. R.* has been shown to be incorrect in many particulars, and has no claim to be considered as conclusive. Though no replication was, in fact, filed, yet the answer must be considered as having been put in issue by the whole course of the proceedings. Such, also, must be the effect of the agreement, that the original suit was to be considered as revived.

THE CHANCELLOR. A rehearing has been granted on the application of the defendants, who are executors of *C. C. Roosevelt*, deceased, against so much of the decretal order of the 7th of *March*, 1820, as overruled the 2d and 3d exceptions taken by these defendants to the master's report.

The 2d exception was, that the master had not credited the estate of *C. C. R.* with *commissions* on the moneys expended by him, on account of the estate of *Nicoll*, or with any other allowance for his agency and services in relation to that estate.

I am entirely satisfied, that under the circumstances of the case, there is no real equity in this claim for commissions. *C. C. R.* admits, in his answer, that he assumed the agency of the estate of Doctor *Nicoll*, at the request of the administratrix, and from motives of humanity and benevolence, as he had been a friend to the intestate, and was connected by marriage with the family. It was a very loose and undefined agency, and Mrs. *Ludlow*, the administratrix, states, in her testimony, that she intended to confide to his discretion the management of the estate, to the extent of her power. He dealt with the funds of the estate very much at his own discretion, and though with honest intentions, yet evidently with a regard to his own convenience. It would be giving too much encouragement

to a lax and officious interference, to allow a commission in this case to the agent of the administratrix, who ought either not to have assumed the trust, or to have executed it herself.

The 3d exception was, that the master had charged the estate of *C. C. Roosevelt* with interest on such items of the petitioner's charge as were allowed by the master, and had credited the estate with interest on such items of the defendant's discharge, as were allowed by the master, in those instances where *C. C. R.* had no funds in hand belonging to the estate, at the time of the payments mentioned in the items of the defendant's discharge, so allowed.

So far as *C. C. R.* acted as the authorized agent of the administratrix, I admit he ought not to be charged with interest on moneys belonging to the estate, provided he acted with good faith, and according to the directions of his principal. But in respect to the receipt of rents of the real estate of *Nicoll*, he could not have acted as agent of the administratrix, for she had no power over these subjects. He acted in respect to the real estate as assumed trustee, for the infant heirs of *Nicoll*, except so far as the proceeds of the real estate arose from sales by the administratrix, under an order of the Court of Probates. I am induced to think, that interest was too extensively allowed under the decretal order, now under review, and it was allowed from the consideration, that *C. C. R.* did not keep the moneys of the estate distinct from his own, and suffered balances to accumulate on hand, from year to year, while interest was growing or accumulating on debts due from the estate. I ought to have given more weight to the consideration, that *C. C. R.* was acting, in general, as the agent of the administratrix. He avers, in the answer, that he acted in this character, and Mrs. *Ludlow* herself confirms it by her testimony. He was in fact her banker, except so far as he meddled with the rents or pro-

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ceeds of the real estate, in cases where she had no authority to act herself, or to confer power upon him. It does not appear, that he ever refused to obey her directions, or refused to account; and under all the circumstances, I shall modify the former decree, touching this question of interest, and confine it strictly to those items in the account, which cannot rest upon his agency under the administratrix, but must be referred to his character as assumed guardian, (and so he declared himself to be,) for the heirs of *Nicoll*. In the character of trustee for the infants, he must be held strictly to the obligations of his trust, which he assumed, without the sanction of a regular authority, and without giving the requisite security, that is demanded in such cases.

The exceptions, which were taken on the part of the heirs of *Nicoll*, and overruled, were opened for review in consequence of the rehearing granted to the opposite party. But on a re-examination of them, I see no reason to alter the former decree.

The charges, that are sought to be allowed, and which were disallowed by the master, rest on the testimony of Mrs. *Ludlow*, and that is not sufficient against the answer of *C. C. R.*, which, though inaccurate in several respects, is not sought to be impeached as intentionally wrong.

She referred to a paper or memorandum not produced, and to her account rendered to the surrogate, in which some of these items in question are stated to have been paid. The answer of *C. C. R.* had schedules annexed to it, which were declared to contain a true account of the moneys received and expended; and it is to be here observed, that *C. C. R.* lived 18 months after his answer was put in, and that answer was not put in issue in his life time. The answer seems to have been a direct and pertinent answer to the interrogatories in the bill, for he was called upon to state, "what part of the personal estate of Doc-

tor *S. N.* had come to his hands, and what part had been sold or assigned, and that he should set forth a detailed account of the personal estate, and the moneys arising therefrom, and discover and produce the accounts of his transactions."

On this subject, the testimony of Mrs. *L.*, in opposition to the answer, would have been interested and inadmissible, if she had not been discharged by the heirs of *Nicoll*, on the 10th of *November*, 1810, from the charge of "all moneys, goods and accounts, received by her as administratrix." Though this was not a technical release from the want of a seal, it was a complete settlement with her, and acquittance of her as administratrix; and it becomes a serious question, whether these heirs can, by means of her testimony, throw the responsibility which belonged to her as principal, exclusively upon her agent. The administratrix was the person immediately and properly responsible to the heirs, and she was equally responsible to them for the agency of *C. C. R.*, whom she employed. It was in her power, at any time, to have settled with her agent, and to have discharged him, and if it was done *bona fide*, and not collusively, the settlement would have been a protection to the agent against the heirs. (See the cases cited, and commented upon, in 3 *Johns. Ch. Rep.* 479, 480.) A voluntary discharge of the principal would seem to be a discharge of the agent also. There was no mistake in the case. The heirs, it is evident, were duly and fully apprized of the great extent of this agency, and there is something very forbidding in the attempt to charge the estate of the agent with additional items, in opposition to the answer, and on the single testimony of the administratrix, who has been released.

I shall, therefore, confirm the former decree, so far as it disallowed the 2d exception taken on the part of the executors of *C. C. R.*, and so far as it disallowed all the ex-

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ceptions taken on the part of the heirs of *Nicoll*; and I shall modify the decree as to the third exception on the part of the executors, by exempting the estate of *C. C. R.* from the payment of interest on monies belonging to the estate of *Nicoll*, and which were received under the authority of the administratrix. But I shall still direct the estate to be charged with interest on all monies received by *C. C. R.*, as rents and proceeds of the real estate of *Nicoll*, except the proceeds of sales of the real estate, made in the name, and by the authority, of the administratrix, under the orders of the Court of Probates.

Order accordingly.

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GILES v. BAREMORE.

GILES *against* BAREMORE and others.

Presumptions, arising from a lapse of time, and the circumstances of the case, of the payment of a debt, are allowed as much in this Court, as in a Court of law. This Court makes the presumption on the facts before it, without sending the case to law.

Where a defendant, in his answer, does not directly insist on the presumption of payment; but declares his entire ignorance as to the fact, and insists on his having a complete title to the premises mortgaged to secure the debt, having purchased *bona fide*, from the mortgagor, without notice, &c., and been in the quiet possession for above thirty years: *Held*, that this was sufficient to entitle him to raise the objection, at the hearing, of a presumption of payment of the mortgage debt.

Presumptions of payment, founded on lapse of time, are matter of evidence; and not, in most cases, *proprio jure*, matter of plea in bar.

Where a mortgage had been executed forty years, and there was an interval of 35 years, from the time the State were supposed to have acquired an interest in the debt, by the attainder of the mortgagee, to the commencement of the suit, and no interest paid or demanded, the mortgage was presumed to have been satisfied, either to the mortgagee, before his attainder, or to proper agents of the State, afterwards.

A mortgage is no evidence of a subsisting title, if the mortgagee never entered, and there has been no interest paid for twenty years.

THE bill, (filed *April* 26th, 1815,) stated, that on the 1st of *March*, 1775, *Nicholas Delavergne*, of *Charlotte*, in the county of *Dutchess*, executed a bond and mortgage to *William Axtell*, of the city of *New-York*, for £282 8s. 8d., (706 dollars and 8 cents,) payable on the first day of *May*, following, with interest. The land mortgaged consisted of a moiety of 2,400 acres, and another parcel of 206 acres. The mortgage, containing the usual power of sale, was registered *Feb.* 17th, 1776. *W. A.* the mortgagee, being attainted under the act of the 22d of *October*, 1779, *November* 16th and *December* 21st.

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all his estate, real and personal, became forfeited; and the bond and mortgage, by reason thereof, became vested in the people of this State. That by several subsequent acts of the legislature, it was made the duty of every citizen indebted to any person, whose estate was forfeited, to disclose such debts, and to make payment thereof, in the manner prescribed in those acts. That *N. D.* never disclosed, or made payment of, the debt due by him to *W. A.*, but fraudulently concealed it. That *N. D.* died in 1780, and his executrix, who proved his will and was qualified in *June*, 1786, died without disclosing, or paying, the debt according to the act, and the debt remained due and unpaid. That *N. D.*, in his life time, sold and conveyed his equity of redemption in the mortgaged premises to various persons, and no part of the lands came to his heirs by devise or descent. That the defendant *B.*, and divers other persons, unknown to the plaintiff, are in possession of parcels of the mortgaged premises, the quantity and boundaries of which are unknown to the plaintiff. That by an act of the legislature, passed *March* 25th, 1814, it was made lawful for the plaintiff to sue for and recover, in his own name, all such debts as were due and owing to *William Axtell*, deceased. at the time of his attainder, which remained unpaid, and to appropriate the moneys to his own use; provided always, that nothing therein contained should be construed to deprive the defendants in such actions of any legal defence. That the mortgage debt, above mentioned, remains due. with all the interest thereon, and the mortgage has become absolute, and the defendants refuse to pay, &c. *Prayer*, that the defendant be decreed to come to an account with the plaintiff, for the principal and interest due on the mortgage, and to pay the same, with costs, or that the equity of redemption be foreclosed.

The defendant *B.*, in his answer, admitted, that a bond and mortgage had been executed by *N. D.*, as stated in the bill; that *N. D.* died in 1780, having appointed his wife sole ex-

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trix, &c. but he knew nothing of the other charges in the bill. He stated, that he was in possession of 180 acres of the tract of land, last described in the mortgage; and set forth the names of the persons in possession of the residue thereof, in different parcels, purchased by them of the defendant. That *James Livingston*, formerly sheriff of *Dutchess* county, executed a deed to the defendant, dated *January* 5th, 1765, reciting, that he, *J. L.*, on that day, under a *fieri facias*, issued on a judgment in the Supreme Court, in favour of *Mary Verplanck*, and *Charles Crommeline*, against *N. D.*, had sold to the defendant, for the consideration of 300 pounds, 206 acres of land, &c. which was the same land in possession of the defendant, and the persons named by him, and part of the premises described in the mortgage. That the sheriff's deed was proved *April* 16th, 1796; and the judgment, on which the execution was issued, was docketted the 16th of *September*, 1765. That the conveyance to the defendant by the sheriff, was *bona fide*, and for a valuable consideration. That the tract of land, first described in the mortgage, was in the possession of various persons, whose names were stated, in different parcels, all of whom held under the defendant. That *John De Witt*, formerly sheriff of *Dutchess*, by his deed, dated *August* 27th, 1793, under a sale made by virtue of a *fieri facias*, issued on a judgment, docketted *April* 26th, 1755, revived by *scire facias*, in favour of *James M'Evers* and *Charles Ward Apthorp*, executors, of lands of which *N. D.* died seised, and *Mary D.*, *E. D.*, and *W. D.*, were returned tenants, conveyed to the defendant 700 acres of land, described in the sheriff's deed, being part of the mortgaged premises, for the consideration of £172 0s. and 3d. That the real quantity of acres, as comprised within the courses and distances, was 1,471 acres, as was publicly understood at the time of sale. That the judgment and proceedings were *bona fide*, and the judgment on the *sci. fa.* was docketted the 15th of *October*, 1792, for £160 10s. and 3d.

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The defendant further stated, that he was "ignorant whether *N. D.* did or did not, during his life time, make payment of the debt, as in and by the acts mentioned in the bill, was directed, nor did he know whether the said debt was still unpaid or not. Nor whether *Mary D.*, the executrix of *N. D.*, died without making payment of the debt." That "the defendant was well advised, that he had an ample and complete title to the mortgaged premises, which he purchased for a *bona fide* and valuable consideration by virtue of the sales under the two several judgments of record against *N. D.*, long previous to the date of the bond and mortgage; and that the defendant, and the persons named as being in possession under him, have been in the peaceable and quiet possession thereof, since the date of the several deeds, above mentioned, from *James Livingston* and *John De Witt*, to the defendant."

Answers were, afterwards, in *April*, 1817, put in by the several persons named by the defendant *B.* as being in possession of different parcels of the land under him, stating that they were *bona fide* purchasers under the defendant *B.* for a valuable consideration, and without notice of any incumbrance, and insisting upon the presumption of payment, &c.

November 16th, 1821. The cause came on to be heard, on the pleadings and proofs.

A. Burr, for the plaintiff.

Woodward and *P. Ruggles*, contra. They cited 12 *Johns. Rep.* 242. 3 *Johns. Rep.* 383. 386. *Coup.* 102. 214, 215. 2 *Vesey*, jun. 11. 272. 280. 3 *Johns. Ch. Rep.* 280.

THE CHANCELLOR. *James Baremore* may be considered as the principal defendant, for all the other defendants in possession of any part of the mortgaged premises, derived

title from him. He, if any person, ought to be first called upon to pay the mortgage debt. Indeed, it was admitted, upon the argument, by the counsel for the plaintiff, that *Baremore* was in possession of a sufficient portion of the mortgaged premises to satisfy the debt, and that he had no desire to press the other defendants, because, if they were obliged to pay, they would be entitled to resort over to *Baremore* for their indemnity. If the claim can be sustained against any of the defendants, it certainly can against him.

Let us then examine the case as it stands against *Baremore.*

One of the points, made at the hearing on the part of *Baremore*, as well as on the part of the other defendants, was, that the mortgage debt is to be presumed, from the lapse of time, to have been paid and extinguished. All the other defendants, except *Baremore*, insist in their answers upon this presumption of payment. He does not state that ground in so many words, but he states enough in his answer, to enable him to raise that objection, at the hearing, to the demand. He declares his ignorance, whether *Nicholas Delavergne*, the mortgagor, and who he says died in the the year 1780, made payment of the debt, or whether his executrix made payment of the debt, or whether the mortgage debt is still due and unpaid or not. This was saying enough to entitle him to avail himself of any presumption, against the present existence of the debt, that the facts in the case would warrant. He insists further, that he hath an ample and complete title to the mortgaged premises, which he purchased at sheriff's sale, as stated particularly in his answer, and that he and the other persons, who claim under him, have had peaceable and quiet possession, since the date of those sheriffs' deeds in 1785, and 1793.

The date of the deed, under which he holds the land, in his actual possession, is the 5th of *January*, 1785, and his

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possesion, in the character of owner, has been continued from that time, which makes a period of thirty years before the commencement of the suit.

Presumptions of payment, founded on lapse of time, are matter of evidence, and not, in most cases, proprio jure, matter of plea in bar.

This Court, equally with a Court of law, or jury, may draw the conclusion; and if the defendant in his answer does not waive the benefit of the presumption, but insists on his ignorance of the fact of payment, necessarily arising from his being a stranger to the transaction, and upon the staleness of the demand, he may raise the objection at the hearing.

These presumptions of payment, founded on the lapse of time, are matter of evidence resulting from the facts in the case, and are not in many cases, *proprio jure*, a matter of plea in bar. They are conclusions to be drawn by this Court, from the proofs, in like manner as they are to be drawn by a jury upon a trial at law, and if the defendant does not waive the benefit of the presumption in his answer, but insists upon his ignorance of the fact, whether payment has or has not been made, and which ignorance is necessarily founded upon his being a stranger to the mortgage, and upon the staleness of the demand, he has a right to raise the objection at the hearing. He has a right to insist upon "his ample and complete title," and to rest it upon any of the facts or presumptions warranted by the case. In *Deloraine* v. *Browne*, (3 *Bro.* 633.) Lord *Thurlow* overruled a demurrer taken to a bill, on the ground of the staleness of the demand, but admitted, that the circumstance would have its weight, or might be urged at the hearing.

These presumptions do not always proceed, as has been repeatedly observed, (Lord *Mansfield*, in *Eldridge* v. *Knott*, *Cowp.* 214. and Sir *William Grant*, the Master of the Rolls, in *Hillary* v. *Waller*, 12 *Vesey*, 252.) on the belief, that the thing presumed has actually taken place. A grant, which is of course a matter of record, may be presumed against the crown, not that the Court really thinks, as Lord *Mansfield* has observed, that a grant has been made, because it is not probable a grant should have existed without its being upon record, but they presume the fact for the purpose, and from a principle, of quieting the possession.

The defendant says he is ignorant whether or no the debt has been paid; and in *Hillary* v. *Waller*, (*ubi supra*,) the Master of the Rolls says, "It is because there are no means

of creating belief or disbelief, that such general presumptions are raised." Instead of belief, which is the foundation of the judgment upon a recent transaction, the legal presumption in matters of antiquity holds, as he observed, the place of particular and individual belief.

Presumptions drawn by Courts against stale demands are founded in justice and policy.

These presumptions, to be drawn by the Courts, in the case of stale demands, are founded in substantial justice, and the clearest policy. If the party, having knowledge of his rights, will sit still, and, without asserting them, permit persons to act as if they did not exist, and to acquire interests, and consider themselves as owners of the property, there is no reason why the presumption should not be raised. It is, therefore, well settled, that the presumption, that a demand has been satisfied, prevails as much in this Court, as it does at law. Claims, the most solemnly established upon the face of them, will be presumed to be satisfied after a certain length of time. Matters of record, deeds, and even a private statute, may be presumed to make good a title. A Court of Equity, makes the presumption on the facts before it, without sending the case to law, provided a jury, upon the same facts, ought, and would, so presume. The presumption resolves itself into this, that a man will naturally enjoy what belongs to him. These are principles of decision adopted and sanctioned in a variety of cases, and by a succession of learned judges in the *English* Court of Chancery; and their solidity is not to be questioned, and they apply with the utmost propriety and force to the present case. (See in *Jones* v. *Turberville*, 2 *Vesey*, jun. 11. *Eyre* and *Wilson*, commissioners; and the Master of the Rolls, in *Pickering* v. *Lord Stamford*, 2 *Vesey*, jun. 272. 583. and also in *Hillary* v. *Waller*, 12 *Vesey*, 265, 266. 269. 270.)

The mortgage here, was executed 40 years and upwards before the commencement of this suit, and there was an interval of 35 years between the time, that the people of this

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State are supposed to have acquired an interest in the bond and mortgage, by the attainder of *Axtell*, the mortgagee, and the assignment of their right and interest to the plaintiff, by the act of the legislature of *March*, 1814. It will not be disputed, that the rights of the original mortgagor, and of those persons claiming under him, were not impaired either by the attainder of *Axtell*, or the transfer of his right to the plaintiff. Their means of defence are the same against the plaintiff, as they would have been if *Axtell* had not forfeited his interest, and was now, in proper person, seeking to foreclose his mortgage. Here then is an outstanding mortgage of 40 years, and no interest paid or demanded, and possession and a claim of ownership regularly continued in and under the title of the mortgagor, down to the filing of the bill. Can there exist a much stronger case on which to establish the presumption of satisfaction? The mortgage was registered early in the year 1776, and the people of this State, through their regular constitutional trustees, and ministers or agents, are presumed to have known of that record. If a grant may be presumed, though there be no record of it, a payment to the competent authorities of this State by *Nicholas Delavergne* in his life time, or by his lawful representatives, is more readily to be presumed. A payment may even be presumed to have been made to the original mortgagee, between the time of the registry of the mortgage in *February*, 1776, and his subsequent adherence to the enemies of this State. A payment to him during that interval of time, would have been a valid payment.

A mortgage is no evidence of a subsisting title, if the mortgagee never entered, and there has been no interest paid for twenty year

It is a well settled rule, both at law and equity, that a mortgage is not evidence of a subsisting title, if the mortgagee never entered, and there has been no interest paid or demanded for 20 years. These facts authorize and require the presumption of payment. This rule was declared by Lord *Holt*, in *Wilson* v. *Witherby*, (*Buller's N. P.* 110.) and in a case which the Master of the Rolls, in *Hillary* v. *Waller*,

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(12 *Vesey*, 266.) said he recollected to have arisen before Lord *Mansfield*. A mortgagee brought his ejectment, the deeds and bond were proved; but all went for nothing, because he had not received any money upon the mortgage for 25 years, though living within a street of the mortgagor. Upon that fact the mortgage was considered satisfied. So, again, in *Oswald* v. *Legh*, (1 *Term Rep.* 270.) 20 years without demand, was held by the K. B. to be *of itself* presumption, that the bond was paid; and Lord *Thurlow*, in *Nash* v. *White*, (3 *Bro.* 289.) in the very case of a bill to foreclose a mortgage, admitted the rule, that if there be no possession, or demand, or interest paid, for 20 years, it raised the presumption of payment. The same rule of presumption has been adopted in favour of the mortgagee, when he has had possession for 20 years, and the mortgagor will not be let in to redeem. (3 *Atk.* 313. *anon.*) Many of the cases go so far as to allow a demurrer to a bill to redeem, when it appears by the bill itself, that the mortgagee has been in possession for 20 years, and nothing to rebut the presumption is stated. (*Jenner* v. *Tracy*, 3 *P. Wm.* 287. *note B. Frazer* v. *Moor*, *Bunb.* 54. *Bockford* v. *Close*, cited in 3 *Bro.* 644.) and the presumption, arising from length of time, may always be raised, unless the defendant, in his answer, as in *Proctor* v. *Oates*, (2 *Atk.* 140.) absolutely submits to the demand. In that last case, Lord *Hardwicke* said, there was no colour for the redemption, (for the mortgagee had been in possession 25 years,) but on the ground of the defendant's submission, he decreed an account.

The Supreme Court has more than once recognized the rule, that a mortgage is not a subsisting title, if the mortgagee never entered, and there has been no foreclosure, nor payment of interest within 20 years. (7 *Johns. Rep.* 283. 3 *Johns. Rep.* 386.) But the case of *Jackson* v. *Wood*, (12 *Johns. Rep.* 242.) is worthy of particular notice, for it is a case that is closely, and in all its parts, analogous to

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the one before me. In that case, a mortgage was given in *April*, 1775, to *John Munro*, who was afterwards attainted of adhering to the enemy; an ejectment was brought upon this mortgage in the name of the people; and on the trial, one ground of defence was, possession for 20 years under a claim of right and presumption of payment. The *chief justice* told the jury, that though the people were vested with the rights of the mortgagee, the jury had a right to presume payment from the lapse of time. On the motion for a new trial, the Supreme Court observed, that there was no sufficient evidence to rebut the presumption of payment arising from the lapse of time, as here was no entry by the mortgagee or those under him, nor demand, or interest paid, for 20 years. The jury, as they held, were warranted to presume an extinguishment of the mortgage.

What the jury were warranted to infer in that case, it is equally my duty to presume in this. This view of the subject relieves me from the necessity of discussing the merits of the title put forward by the defendants, under the two deeds of 1785, and 1793; and on this single point of the presumption and conclusion of law, founded on the lapse of time, that the mortgage is no longer a subsisting evidence of debt or title, I shall dismiss the bill as against all the defendants, without costs.

Decree accordingly.

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A plea may be good in part, and bad in part: and where a plea is more extensive than the subject matter to which it relates, it will be allowed to stand as to so much of the bill to which it properly applies; and the defendant must answer as to the residue.

A decree, or judgment by consent, is binding and conclusive, unless procured by fraud.

Where a party to a judgment, entered up on a warrant of attorney, voluntarily waives his defence, or remedy, on the ground of fraud or usury, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it, or to investigate the merits of the original transaction between the original parties.

As, where the party against whom a judgment had been entered, founded on an usurious consideration, filed a bill for relief against the judgment on that ground, but afterwards voluntarily consented to a decree dismissing the bill with costs: *Held*, that a subsequent purchaser of the land, on which the judgment was a lien, could not impeach it on the ground of usury or fraud.

THE bill was filed *January* 31st, 1820. *Dirck Tenbroeck* and his wife, by deed of the 20th of *December*, 1813, for the consideration of 5,100 dollars, conveyed to *James Kane*, in fee, all his interest in a tract of land called *Elizabethfield, at the Norman Kill*, in *Albany* county, containing 1044 and an half acres. On the 20th of *March*, 1813, *D. Tenbroeck* and his wife, for the consideration of 7,305 acres, conveyed to *James Kane*, in fee, 487 acres of land at *Elizabethfield*. *J. K.*, afterwards, sold and conveyed different parcels of the said land in fee, to the other plaintiffs, which were particularly stated in the bill. On the 10th of *May*, 1818, *James K.* gave a bond for 243,000 dollars to *Charles K.*, *Dirck Van Schelluyne* and *Oliver K.* with a warrant of attorney, on which a judgment was entered up

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on the same day, and a *fi. fa.* issued thereon the 11th of *April*, 1818, by which 152 acres, parcel of the land so conveyed, was sold by the sheriff to *E. Kane*, for 25 dollars. On the 26th of *February*, 1813, *Dirck Tenbroeck* gave a bond to the defendant for the penal sum of 20,000 dollars, conditioned for 10,000 dollars, with warrant of attorney, on which a judgment was entered up, the 27th of *February*, 1813. An execution on this judgment was issued, by virtue of which, lands of *D. T.* in *Saratoga* county, valued at 20,000 dollars, were sold by the sheriff, and purchased by the defendant for 500 dollars. That a *test. fi. fa.* for the residue of the debt, was issued to the sheriff of *Albany*, who levied on the lands, above mentioned, and conveyed, at *Norman's Kill*. The plaintiffs allege, that the bond and warrant of attorney, so given by *D. T.* to the defendant, were *usurious*, fraudulent and void. That the defendant proposed to sell to *D. T.* 250 acres of land in *Cosby's* manor, in *Oneida* county, to which he pretended to have title, and to advance to *D. T.* 750 dollars, if he would take a gig and harness at 500 dollars, and the 250 acres of land at 35 dollars per acre, and would secure the amount, being 8,750 dollars, by a judgment bond; that *D. T.*, being in necessitous circumstances, assented to the proposal; and the bond and warrant of attorney were accordingly given. The plaintiffs averred that the agreement was by parol; that the gig and harness were not worth 500 dollars; and that the defendant never had any title to the land in *Cosby's manor*. That on the 24th of *July*, 1813, *D. T.* filed a bill against the defendant, *J. Kane* and three other persons, to set aside the bond and warrant of attorney, and judgment, and to restrain all proceedings thereon. That *D. T.*, by his urgent necessities, was induced to enter into a written agreement, on the 15th of *April*, 1814, which was set forth in the bill, by which, after various recitals, *D. T.*, for the consideration of 1,000 dollars paid to him, and of 5,000 dollars, which the defendant agreed to deduct

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from, and consider as satisfied on the last mentioned judgment, agreed to dismiss his bill, and pay the costs, and relinquish all objections to the judgment, and discharge the defendant from his contract to convey the 250 acres of land in *Cosby's* manor, and that the said judgment should remain in force for the balance, after deducting the 5000 dollars, but that no execution should issue thereon, for six months. That the defendant had assigned the judgments to *J. Kane*. The bill charged, that the judgment and execution were fraudulent. *Prayer*, for an injunction against a sale under the execution, and that satisfaction of the judgment be decreed to be entered, or the lands of the plaintiffs be exonerated therefrom, and for general relief.

The defendant put in a *plea* and *answer*: As to so much of the bill as seeks to impeach or set aside the judgment against *D. T.* for 20,000 dollars, and the execution thereon, and to exonerate the lands of the plaintiff therefrom, and to compel the defendant to set forth the consideration of the judgment, the defendant *pleaded in bar*, that on the 24th of *July*, 1813, *D. T.* filed his bill against the defendant and three others, to avoid the judgment, &c. That the defendants appeared and answered, gainsaying and avoiding the charges, &c. That on the 14th of *April*, 1814, *D. T.* agreed to dismiss the bill, &c. (setting forth the agreement, *in hæc verba*.) That, in pursuance of this agreement, a *decree* was made and entered, the 16th of *April*, 1814, dismissing the bill, as against the defendant and *W.* another of the defendants in that suit; and confirming the judgments mentioned in the bill. That this decree remains in full force, and the defendant pleaded the agreement and decree in bar to so much of the bill, and of the relief sought thereby, as seeks to avoid, or draw in question, the judgment for 20,000 dollars, or the lien or operation thereof, or to compel the defendant to set forth the consideration, and to all the relief prayed by the bill.

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In support of his plea, and for *answer* to the residue of the bill, the defendant stated, that after he had filed his answer to the bill of *D. T.*, he was solicited by *D. T.* to repurchase the 250 acres of land in *Cosby's* manor, which the defendant consented to do, and to allow him for the same 6,000 dollars; that is, 1,000 dollars in cash, and 5,000 dollars on the judgment, and that the defendant, accordingly, paid *D. T.* 1,000 dollars, and gave him credit on the judgment for 5,000 dollars. The defendant denied, that the *agreement or the decree*, above mentioned, were fraudulent or collusive, or that any undue advantage was taken of *D. T.*, to induce him to enter into the agreement; but he averred that the same was fairly made, &c. He admitted the issuing of the execution to *Saratoga*, and the sale of lands of *D. T.* as stated in the bill; but that *James K.*, or some person in his name, had, afterwards, issued an execution on an older judgment, under which the lands in *Saratoga* had been seized and sold, whereby the defendant lost his whole title to those lands. He admits that he caused an execution to be issued for the balance on the judgment, with directions, as stated in the bill, which he thinks was incorrect as to the amount due, and was willing that it should be corrected, and reduced to 5,806 dollars and 4 cents, after deducting from the interest the 500 dollars arising from the sale of the lands in *Saratoga*. He insisted, that this balance was justly due, and that the lien of his judgment was prior to any of the conveyances by *D. T.*

April 6th. The plea was brought to argument this day.

Henry, for the plaintiffs, contended, 1. That part of the defence made by the plea was bad, and the whole ought, therefore, to be overruled.

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2. That the plea was to the whole bill, and the answer to parts of the bill overrules the plea.

3. That the matter of the plea was insufficient, inasmuch as the suit and decree therein stated, were instituted and made after the acquisition of the title under which the plaintiffs claim; as the plaintiffs were not parties to that suit, their right to avoid the judgment confessed by *D. Tenbroeck*, is perfect, and not impaired or affected by that suit or decree. (*Cooper's Equity Plead.* 229, 230. 1 *Anst.* 59. 2 *Bro. C. C.* 641. 645, 646. 648, 649.)

H. Bleecker, contra, insisted, 1. That the *decree* set forth in the plea, precluded the plaintiffs from inquiring into the consideration of the judgment in favour of the defendant against *D. T.*

2. That the plaintiffs purchased after the judgment was docketted, and after the bill filed by *D. T.*, and are bound by the judgment.

3. That the defendant in that judgment, could not now set up, nor could the plaintiffs, at any time, avail themselves of, the *usurious* consideration, if any such existed. (*Ambler*, 229. *Coop. Equ. Pl.* 99. 1 *Ch. Cas.* 231. *Comyn's Dig. Chancery*, Y. 2. *Phillips' Ev.* 227. 262. 2 *Madd. Ch.* 248. 2 *P. Wm.* 74. *Cowp.* 285. *Sugden L. of V.* 432. 484. 1 *Madd. Ch.* 217. 221. 1 *Fonbl. Equ.* 217. *Viner. tit. Usury*, 308. *pl.* 7. *Str.* 1043. 3 *Johns. Ch. Rep.* 395. *Ambler*, 293.

July 12th. By a decretal order of this day, the plaintiffs have leave, within thirty days after notice of the order, to reply and take issue on the plea, on payment of the costs of the hearing and of the order, or that the bill of the plaintiffs be dismissed, with costs, &c.

The plaintiffs afterwards petitioned for a rehearing against the order, which was granted.

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November 12th. The cause was this day reheard, and was argued by

Henry, for the plaintiff.

Slosson, contra.

December 27th. The cause stood over for consideration until this day.

THE CHANCELLOR. The bill charges the judgment against *Tenbroeck*, in favour of the defendant, to have been usurious, fraudulent and void, being founded not only in usury, but in manifest oppression, corruption, and extortion. This was the chief *gravamen* in the bill; and all the other charges, except one, seem to have been the mere result and consequence of this original injury. Thus it is charged, that *Tenbroeck* filed his bill in this Court to be relieved against the judgment, on account of the corrupt and fraudulent nature of the same, but that the defendant, taking advantage of his pecuniary necessities, induced *Tenbroeck* to dismiss his bill, and recognize the validity of the judgment, after a certain reduction in the amount. It is also charged, that the defendant fraudulently issued his execution to the sheriff of *Saratoga*. But there could have been no complaint of the settlement of the suit between *Tenbroeck* and the defendant, nor of the mere fact of issuing an execution to the sheriff of *Saratoga*, if the original judgment had been deemed just and sound. That execution could not have been charged as having issued fraudulently on any other ground. An execution may well issue, and yet the direction to levy more than is due be an abuse. The plaintiffs contend, that the defendant has attempted to cover, by the judgment, one thousand dollars subsequently advanced. If this were so, (and which I do not now stay to examine,) yet the execution could not, on

that account, have been deemed a fraudulent one, and it would have been good for what was really due under the judgment. To all this part of the bill, which seeks to impeach, or set aside, the judgment and the execution thereon, the defendant pleads in bar the settlement of the suit in Chancery, and a decree entered by consent between *Tenbroeck*, and the defendant, on the 16th of *April*, 1814, dismissing the bill, and recognizing the validity of the judgment. The answer, accompanying the plea, and intended as auxiliary to it, denies that the agreement to discontinue the suit, and the decree entered in pursuance of that agreement, were collusive or fraudulent, and avers the same to have been fairly procured. The plea is set up in bar "to so much, and such part of the bill, and of the relief sought thereby, as seeks to avoid or draw in question the judgment, or to compel the defendant to discover and set forth the original terms and consideration thereof, and to all the relief prayed for in and by the bill, and that he ought not to be compelled to make any other or further answer to so much and such part of the bill, as is herein and hereby pleaded unto as aforesaid."

This plea was evidently intended to be a bar to that part only of the bill, which sought to impeach the judgment. It is to *so much of the bill*, &c. and that the defendant be not compelled to make any other answer to *so much, and such part of the bill*, &c. But the plea did conclude *to all the relief prayed for, in and by the bill.* The specific prayer in the bill, was not only for an injunction, but that satisfaction might be decreed to be entered or the lands of the plaintiffs exonerated; and we perceive, that there was another distinct charge in the bill, not immediately connected with the infirmity of the judgment, and to which an intimation, which I have already made, had reference. This charge is, that the sale in *Saratoga* county was fraudulently conducted, and competition prevented, by which means the defendant was enabled to buy in a large estate of *Tenbroeck*, for a

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consideration almost nominal. Under certain circumstances, such a fact may operate as a satisfaction of the judgment and execution, and the charge of that fraud was not covered by the plea, and yet that charge might have been one ground of the prayer for the relief. The difficulty is, that the plea, after concluding properly to *so much of the bill, &c.*, goes on, and concludes *to all the relief prayed for*. In this respect the plea was more extensive than the subject matter, to which it related, but the remedy for such a defect is mild and liberal. It is only to order the plea to stand for so much of the bill as it properly covers, and no more, and to require the defendant to answer to the residue of the bill. Thus, in *Dormer* v. *Fortescue*, (2 *Atk.* 282.) Lord *Hardwicke* observed, that where there is a plea which covers too much, the Court will allow it to stand for part, and overrule it for part. It is a well settled rule in this Court, that a plea may be good in part, and bad in part, and that the Court will allow it to stand as to so much of the bill to which it properly applies. The objection to the plea in this case, that it covers too much, does not lie to the body of the plea, but to the conclusion; and even in that respect, the conclusion is inconsistent with itself, for while one part of it goes to the whole relief, the other parts of it confine the plea to the subject matter of the judgment. It can scarcely be considered as any thing more than informality, or a mistake of the pleader; but the defect can easily be cured. We have an ancient case, very much in point, in *Allison* v. *Sharpley*, (*Hard.* 216.) in which a too extended conclusion to a plea in bar, being to the whole bill, when the matter of the plea was special, was corrected by the order, that as to what was not contained in the plea, the defendant ought to answer.

A plea may be good in part, and bad in part: and where a plea is more extensive than the subject matter to which it relates, it will be allowed to stand, as to so much of the bill to which it properly applies, and as to the residue, the defendant must answer.

So far, the decretal order in this cause, against which a remedy is sought by the rehearing, was manifestly erroneous, and ought to be corrected. The defendant must answer to that part of the bill, not covered by the plea, viz.

the fraud in the sale in *Saratoga* county. Until the facts respecting that sale are fully disclosed and discussed, it will be impossible to say how far the sale may have operated towards satisfaction of the judgment.

Another charge, which may be deduced from the bill, as being altogether distinct from the averments, impeaching the judgment, is that the defendant gives credit on the judgment only, for 5,000 dollars, in consequence of the agreement, stated in the bill, and admitted in the plea, whereas he ought to have given credit for 6,000 dollars, which was the price agreed on for the release of the lot in *Cosby's* manor. If that lot was part of the consideration of the judgment, and if that lot, which had never in fact been conveyed to *Teubroeck*, was by a subsequent agreement withdrawn from the consideration of the judgment at a valuation of 6,000 dollars, the conclusion would perhaps be, that the judgment ought to be reduced *pro tanto*. The question, arising on this point, does not touch the validity of the plea, which only goes to bar the plaintiffs from avoiding, or drawing in question, the consideration or validity of the judgment, and the lien created thereby; but it serves further to show, that the decretal order, complained of, was founded in mistake, when it considered the plea, if not put in issue, as a bar to the entire relief. It is not necessary at present to express any opinion, whether the claim, on the part of the plaintiffs, for a further reduction of 1,000 dollars, beyond the 5,000 dollars admitted by the defendant under the agreement set forth in the bill, can be sustained. It is sufficient to say, that here appears to be a fit subject for inquiry and discussion, and which is not strictly embraced by the plea.

Having thus disposed of these points, I proceeded to consider the great and main question in the case, whether the plea be, or be not, a good and valid plea to all that part of the bill, which seeks to question the judgment by impeaching its consideration.

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A decree by consent is binding and conclusive, unless procured by fraud.

When this cause was before me, upon the first hearing, I observed, that "the *gravamen* in the bill was usury, extortion and fraud in procuring of the judgment, and corruption and fraud in procuring the decree set up as a defence. *Tenbroeck*, the original judgment debtor, exhibited his bill in this Court to be relieved from the judgment on the same grounds, and the suit was afterwards dismissed by a decree entered, by consent, upon an adjustment and settlement between *Tenbroeck* and the defendant. No doubt *Tenbroeck* might have been relieved by original bill from that decree, if procured by fraud, but if the decree be pleaded to such an original bill, accompanied by an answer specially denying the fraud, the plea is valid. Thus, in *Loyd* v. *Mensell*, (2 *P. Wm.* 73.) an original bill was filed to redeem a mortgage, and it stated, that the defendant had, by a decree, in a former bill, brought by him against the mortgagor, (the father of the then plaintiffs,) to foreclose the equity of redemption, obtained a decree of foreclosure by fraud. The defendant plead the former decree in bar, and gave no answer to the fraud, and *for that reason* the plea was overruled. And in *Wishall* v. *Short*, (7 *Viner*, tit. *Decree*, p. 398. *pl.* 15. 2 *Eq. Cas. Abr.* 177, *H.* 1. *S. C.*) a like plea to a like bill, accompanied with an answer, denying the fraud, was held good by Lord *Ch. Harcourt*, and the bill was dismissed with costs. The same rule was admitted by Lord *Hardwicke* in *Bradish* v. *Gee*, (*Amb.* 229.) and there can be no doubt of the settled doctrine, that, "a decree by consent is binding, unless procured by fraud; and in such case, the party may be relieved against it, by original bill. But if the fraud be denied in the answer accompanying the plea, the decree, which is impeached, may be plead to such a bill."

These observations and authorities would appear to be unanswerable, if *Tenbroeck* himself was now the plaintiff, seeking to impeach the judgment he had confessed; and I

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cannot see why they are not equally so, when a purchaser under *Tenbroeck*, subsequent to the judgment, seeks the same relief. Judgments and decrees bind privies in estate; and *J. Kane*, the purchaser under *Tenbroeck*, subsequent to the judgment, was a purchaser with notice of the judgment. It is a settled principle, that none but parties or privies can have error upon a judgment, and the doctrine in the old cases is very strong and very applicable to this point. If a tenant *alien even pending a real action*, and then judgment pass against him, the alienee cannot have error for want of privity, and if the alienor bring error and be restored, the feoffee shall enter upon him. (1 *Rol. Abr.* 746. *pl.* 20. 23. and *Viner*, tit. *Error*, *p.* 495. *pl.* 20. 23. and the cases &c. cited in the margin.) The docketing of the judgment and the filing of the roll, are notice of the lien to a subsequent purchaser. *Tenbroeck*, the original party to the judgment, might have impeached it for fraud; but it seems difficult to admit, that even he, the party injured, could impeach a judgment voluntarily confessed, on the ground of usury. He who confesses a judgment, or suffers it to pass by default, is concluded from defence, according to the general language of the cases. (*Middleton* v. *Hill*, *Cro. Eliz.* 588. *Bush* v. *Ever*, *Str.* 1043. *Cases temp. Hard.* 220. *S. C.* *Matthews* v. *Lewis*, 1 *Anst.* 7. Lord Ch. in 14 *Vesey*, 31. Lord *Thurlow*, in *Scott* v. *Nesbit*, 2 *Bro.* 641.) And if the party himself, who is the victim of fraud or usury, chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him, to recall and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very distinct question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the party, it cannot consist in justice or sound policy, that a subsequent voluntary

If the party himself, voluntarily waives the defence to a judgment, on the ground of fraud or usury, and release the other party; a subsequent purchaser under him with notice cannot impeach the judgment, or assume the remedy for him, which he has freely relinquished: more especially,

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purchaser, knowing of that judgment, should be competent to investigate the merits of the original transaction as between the original parties. *Quisque potest renunciare jure pro se introducto.* Feuds and litigation would be interminable, if any distinct purchaser of distinct parcels of land, affected by a judgment, existing, and known when they became interested, could overhale the judgment upon an allegation of usury, extortion or fraud, practised upon their principal, the vendor, when he himself chooses to acquiesce in the alleged injury, or has expressly waived all complaint. It is stated to have been a principle of the common law, that a fraud could only be avoided by him, who had a prior interest in the estate affected by the fraud, and not by him who subsequently to the fraud, acquired an interest in the estate. (*Upton* v. *Basset*, *Cro. Eliz.* 445. and recognized in 3 *Co.* 83. *a.*)

where the party having once filed a bill to set aside the judgment, on the ground of usury, abandons his defence, and consents to a decree against him.

If *Kane*, from whom all the plaintiffs derived title, had not parted with his estate, and had not filed this bill, could he have been admitted to investigate the consideration of the judgment? We have seen that *Tenbroeck* could not, and that the plea would most clearly have been a bar to him. *Kane* was no party to the decree, and that alone would not preclude him, as it would *Tenbroeck*, provided he was previously entitled to open the judgment or impeach it. But being a purchaser from *Tenbroeck*, subsequent to the entry of the judgment, and with knowledge of the judgment, he would be precluded without the decree, and the decree and circumstances attending it may be considered as auxiliary, and as giving special force to the reason and policy of the rule, by which he, and those holding under him, would have been precluded without the decree. *Kane* was a party to *Tenbroeck's* suit, and it cannot but be intended, that he knew of the charge contained in his bill; and yet he suffers, unconcernedly, *Tenbroeck* and the defendant to carry on, and terminate, their controversy, according to their own discretion and judgment, without in-

terposition or complaint. It was terminated in good faith. The decree was obtained fairly, without any imposition or fraud. This is the necessary conclusion, for it is so averred in the answer accompanying the plea, and the cause is brought to a hearing, touching the sufficiency of the plea, without traversing it, and its averments are thereby admitted to be true in point of fact. *Kane* suffers this charge of usury and fraud in the judgment to be discussed and settled by the parties to the judgment, and goes on and sells part of the land bound by the judgment, pending the suit of *Tenbroeck*, and parcels of it, subsequent to the decree; and can it be possible, that he, a stranger to the judgment, and a voluntary purchaser under it, and with knowledge of the subsequent suit, could now be permitted to compel the defendant to discuss the merits of that judgment over again with him; to have his rights and interest twice tried, and twice jeopardized, on a charge of fraud? It would be an anomaly in our jurisprudence, for such a subsequent purchaser to be enabled to revive the litigation. He is precluded, as being a volunteer under a judgment between other persons. He is emphatically precluded from coming here, after those persons have litigated the validity of the judgment, and consented, upon fair terms, to a decree in this Court, waiving all objections to the judgment, and recognizing its obligation. The judgment precludes, on general principles; for the purchaser voluntarily comes in, under the judgment *pro bono et malo*, and except in the special case, in which the judgment was confessed collusively, and by a corrupt agreement to defraud some subsequent purchaser, (a case hardly to be supposed,) he must take the lien as he finds it, and has no business to interfere with the contracts of other people. The decree affirming the judgment, precludes him also, because it gives the judgment the additional force of a *res judicata* between the parties to the judgment, after they had raised questions

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on the judgment themselves. I cannot entertain a doubt that the present attempt, if successful, would be unprecedented, and contrary to the most obvious principles of public policy. It would contravene that sound maxim of the common law, that *expedit reipublicæ ut sit finis litium*.

Let us trace this subject a little farther into its consequences.

If *James Kane*, the purchaser of only a small part of the lands bound by the lien of the judgment, would have had a right to open the merits of the judgment, another purchaser of another parcel of the lands would have had the same right, not only after the original debtor, *Tenbroeck*, had waived or released his right, but even after *Kane* had also filed his bill upon the same ground, and then had settled the controversy upon a similar decree by consent. If a decree by consent, between the original parties, could not bind these privies in estate, would a decree on the merits, after a solemn discussion and consideration by the Court, bind them? There is no difference between decrees entered by consent, and decrees after argument. If fairly entered, they are equally valid and operative, so long as they remain in force. And upon the doctrine of this bill, the defendant might be vexed, again and again, with the same charges, brought forward by different purchasers, under *Tenbroeck*. This would be an oppression, contrary to the genius of our law; and I see no way to avoid this result, but by adhering to the plain rule, that it belongs to the party to the judgment, and to him only, or his lawful representatives, to question the consideration of it.

In the present case, we have not *Kane*, the first purchaser under the judgment, but we have purchasers under him, seeking to open the judgment. The plaintiffs stand two degrees removed from *Tenbroeck*, the party injured. Here are purchasers of a purchaser undertaking to impeach the original judgment; and they all became such after the com-

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mencement of the suit brought by *Ten Broeck*, (and all but one of them after the decree) in which *Ten Broeck* voluntarily waives or settles the cause of action with the defendant. If these plaintiffs can be permitted to impeach that judgment, causes of action might be said to become negotiable, and to be capable of subdivision to any degree, and susceptible of re-litigation to any extent. I cannot imagine a case in which the pretension would appear to be more inadmissible.

I shall accordingly declare the plea to be good, and direct it to stand good, as to all that part of the bill which goes to impeach the consideration of the judgment for usury, extortion, fraud or any other cause alleged in the bill, and that the defendant, within six weeks after notice to his solicitor of this order, answer such parts of the bill not covered by the plea and its accompanying answer, as relate to the charge of fraud in the sale in *Saratoga* county, or to any payments which may have been made upon the said judgment, to the end, that the balance due thereon, (if any) may be ascertained. And I shall further order, that the question of costs be reserved, and that the deposit of 50 dollars, with the register in pursuance of the order for a rehearing, be returned to the solicitor for the plaintiffs.

Decree accordingly.

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AYMAR *against* BILL and others.

Though a mortgagee may, by way of extinguishment, release all his interest to the mortgagor; yet he cannot convey it as a subsisting interest, absolutely, or by a way of mortgage, to a third person; especially, when the mortgage has not become absolute, and there has been no foreclosure For the debt cannot reside in one person, and the pledge in another.

December 31st. BILL, to forclose a mortgage executed to the plaintiff, by the defendants *Bill* and *J. D. Crane*, on the 26th of *August*, 1818, upon a house and lot in the *fifth* ward; and also *upon a house and lot in Vandewater street, in the city of New-York.* The mortgage was executed to secure the payment of a bond for 4.500 dollars, given by those two defendants to the plaintiff, to secure the purchase money of the house and lot, in the *fifth* ward, which the plaintiff had then sold, and conveyed to those two defendants. The mortgage was duly registered on the day after its date. The defendant *Bill*, had previously, on the 9th of *April*, 1817, mortgaged the lot in *Vandewater* street to the defendant *J. D. Crane*, to secure the payment of one thousand dollars, which mortgage was registered on the same day, and was assigned by *J. D. Crane*, on the 22d of *September*, 1818, to *V. Fare*, of whom the defendant *F.* is administratrix, and she, by her answer, claimed a preference over the plaintiff.

The question was, whether the mortgage to the plaintiff had a priority of lien over the mortgage executed by the defendant *Bill* to the defendant *Crane*, upon the lot in *Vandewater* street.

The point was argued by *Dyckman*, for the plaintiff, and by *J. L. Riker*, for the defendants.

The counsel for the plaintiff contended that the plaintiff had acquired an interest in the *Vandewater* street lot, by the mortgage from *Bill*, the owner of the equity, and was in a capacity to accept of a conditional release from *Crane* of his interest as mortgagee. He admitted, that so far as related to third persons, who had no interest in the pledge, the interest of the morgagee could not be sold or mortgaged separately from the bond or debt. A mortgagee may take a release of the lien of a judgment. It is every day's practice; and why not take the release of the lien of a mortgage? Might it not have been done by a formal instrument, reciting all the circumstances? Here the mortgage deed has sufficient granting words. It releases all the "Estate, right, interest, claim and demand whatsoever," of the two mortgagors to the lot in *Vandewater* street, as well as to the lot in the *fifth* ward.

The counsel for the defendent *F.* insisted, that *Crane* had no interest in the lot in *Vandewater* street which he could sell or mortgage, as the mortgage was a mere security for the debt. (1 *Mad. Ch. Tr.* 11 *John. Rep.* 534. 4 *John. Rep.* 43. 1 *P. Wms.* 460. *Domat*, b. 3. tit. 1 *Art.* 9.) A mortgage may be released, which is not here pretended; but it cannot exist independent of the debt. Nothing passed by the mortgage from *Crane* but his interest in the land purchased from the plaintiff, and nothing more was intended to pass. There is no estoppel against him, because he had an interest, which passed by the mortgage. (*Co. Litt.* 42. a. 327. b.) The plaintiff had no interest *prior* to the mortgage, on which the release could operate.

THE CHANCELLOR. The interest of *Crane*, as mortgagee of the lot in *Vandewater* street was not, at the time of the execution of the mortgage to the plaintiff, an interest in the land, capable of being the subject of sale, either absolutely, or by way of mortgage, *distinct* from the debt

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it was intended to secure. It does not appear from the case that the debt to *Crane* was even due, when the mortgage to the plaintiff was executed; and it is clearly to be inferred, that the mortgage had not been foreclosed, or possession taken under it. Though such a mortgage interest may be, by way of extinguishment, absolutely *released* to the party, having the equity of redemption, yet it cannot be conveyed as a still subsisting interest, by way of mortgage, because that would separate the debt and the pledge, the latter to reside in one person, while the debt resided in another. This cannot be done; and the case of *Jackson* v. *Willard*, (4 *Johns. Rep.* 41.) is decisive on the point. It is evident, that no such absolute release was intended in this case; and the act of *Crane* in uniting in the mortgage with *Bill*, is rather to be referred to the legal estate which he derived from the plaintiff, than to his interest as such a mortgagee. He had an interest, which he was capable of mortgaging, and which he no doubt intended to mortgage. and the mortgage deed can have full operation by being applied to that interest. It cannot be applied to his interest as a mortgagee in the other lot, consistently with principles of law, because he had no interest, in that character, capable of alienation, so long as he retained the debt.

There must be a sale of the mortgaged premises including the lot in *Vandewater* street, but with a reservation of the junior right of the defendant *F.* to the proceeds of that lot.

Decree accordingly.

END OF THE CASES.

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I. *Construction, effect, waiver and rescinding of an agreement.*

1. The plaintiff and others formed an association for manufacturing cotton yarn and cloth, and executed articles of agreement, as to the mode of managing and conducting their business: *Held*, that the company could only act by a resolution of the board of directors, or by a general agent, duly appointed, according to the articles of their association; and that the plaintiff, who had been elected *President*, and was, *ex officio*, a director, having entered into a contract, under his hand and seal, in behalf of the company, without such authority from the board of directors, or the consent of the members, it did not bind his associates, but the plaintiff was personally and individually liable. *Skinner* v. *Dayton*, 351

2. Where the plaintiff who had so entered into a contract with the defendants, for machinery to be made for the company, afterwards,

gave notice to the defendants, that the company would not proceed, and that the contract was abandoned on their part: *Held*, that the defendants were entitled to recover damages for the work done, and materials furnished by them, pursuant to the contract; and also, for the loss and injury actually sustained by them, in consequence of the abandonment of the contract by the plaintiff; and that they were not to be delayed in their right to have their damages assessed and levied, by judgment and execution, until the question of contribution between the plaintiff and his associates, was settled, *ib.*

3. But it seems that the plaintiff in such case, having acted without authority of the directors, or of the members of the association, was not entitled to call on the company or his associates, to contribute to the damages, *ib.*

II. *Specific performance.*

4. Where the defendant, who had entered into an agreement with the plaintiff for the sale and conveyance of a lot of land, after the time of performance had elapsed, sold and conveyed the land to a third person, for a valuable consideration, without notice of the agreement, and before the filing of the plaintiff's bill for a specific performance; *Held*, that a specific performance of the agreement, could not be decreed; and that the plaintiff must seek his remedy at law, for a compensation in damages, for the breach of the agreement. *Kempshall* v. *Stone*, 193

5. A specific performance will be decreed against a subsequent purchaser, with notice of the plaintiff's equitable title. *Wadsworth* v. *Wendell*, 231

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ASSIGNMENT.

1. This court will set aside an assignment void at law, and necessarily leading to fraud and corruption. *Arden* v *Patterson*, 44

2. As, where *D.* assigned all his claim and right of action, for a certain quantity of wine, against *A.* to *S.*, in trust for the creditors of *D.*, and *P.*, an attorney, who had acquired a knowledge of the grounds of the claim from *D.* and *S.* as attorney, purchased the right of action of *S.* who supposed it desperate, for a trifling consideration, and then prosecuted the suit for his own benefit, and recovered judgment for the whole amount, the agreement and assignment were held unlawful and void, on the ground of *Champerty*, even though *P.* might be a creditor of *D.*; and on *S.* refunding to *P.* the consideration paid by him, for the assignment, a perpetual injunction was awarded, prohibiting *P.*, or any person for his use, from enforcing the judgment at law against *A.*, *ib.*

3. *A.* and *B.* being concerned together in commercial adventures to *S. America*, *A.*, unknown to *B.* who was abroad, assigned over the whole of the return cargo to *C.*, to secure the individual debt of *A.*, who was an insolvent; and *C.* knew, at the time, that there was

a running account between *A.* and *B.*, arising from these mercantile adventures, though he was ignorant of the nature or extent of the transactions between them, or of the amount of interest, if any, of *B.*: *Held*, that *C.* having sufficient notice of the rights of *B.* to put him on inquiry as to the extent of his interest, took the assignment subject to all the rights and securities of *B. Rodriquez* v. *Heffernan*, 417

4. An assignee of one partner is entitled only to his share, after a settlement of the accounts of the partnership, and all the just claims of the co-partner are satisfied, *ib.*

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BAIL.

1. Where bail become fixed at law with the payment of the debt of the defendant, their character as bail ceases: and after judgment and execution against bail or sureties, there is an end of the relationship of principal and surety. *Bay* v. *Tallmadge*, . 305
2. And bail, in such case, cannot claim any advantage against the creditor, on the ground of a want of due diligence, in prosecuting the principal debtor, *ib.*

BANKRUPT.

1. The rule, in *England*, in cases of the bankruptcy of *joint* traders, seems to be, that joint creditors may prove their debts under a separate commission, and separate creditors under a joint commission; but distinct accounts are kept of the joint and separate estates, and the joint estate is first applied to the payment of the partnership debts, and the separate estate to the separate creditors, and the *surplus* of each estate to the creditors remaining on the other. *Murray* v. *Murray*, 60
2. The assignees under a separate commission of bankrupt, can distribute the whole partnership fund; for, after a separate commission, a joint commission cannot issue, and *vice versa*; and where both are issued, one or the other is superseded, as may best answer the ends of justice, *ib.*
3. The assignees of the bankrupt, and the solvent partner must join in a suit at law, *ib.*

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BARON AND FEME.

1. If a husband appoints an attorney, to recover a debt, legacy, &c. due to his wife, and the attorney receives the money; or if the husband mortgages his wife's interest, or assigns it, absolutely, for a valuable consideration, or if he recovers it by a suit at law, in his own name, or releases the debt, the survivorship of the wife, in these cases, ceases. *Schuyler* v. *Hoyle*, 196
2. In a suit by the husband for the wife's distributive share, the wife must be made a party, *ib.*
3. Where the husband and wife, and other heirs of *F.* who died intestate, in *England*, made a joint power of attorney to *V.* authorizing him to take out letters

of administration there, on the estate of *F.*, to collect the property, &c. and pay over to the parties their distributive shares, respectively, &c.; and after *F.* had taken out administration, but before he had received the property, or paid over the entire share, the husband died; *Held*, that the wife was entitled, in her right, as survivor, to that portion of her distributive share which had not been actually paid over to her husband, *ib.*

4. Where land is conveyed to husband and wife, they do not take as joint tenants, nor as tenants in common, but both are seised of the entirety; neither can sell without the consent of the other; and the survivor takes the whole; this case not being within the provision of the act relative to joint tenancies. (Sess. 9. ch. 12. s. 6.) *Rogers* v. *Benson*, 430

5. A deed by husband and wife, of their joint estate, in trust, to pay all the debts of the husband, and the residue to the use of the wife and her heirs in fee, is a valid conveyance, being founded on a valuable and meritorious consideration, and cannot be impeached by a subsequent purchaser, without notice of the trust, *ib.*

6. The equitable right of the wife to personal property in the hands of her trustees, cannot be disposed of by the husband, without making a suitable provision for her support. *Kenny* v. *Udall*, 464

7. The wife's equity, as it is called, attaches upon her personal property whenever it is subject to the jurisdiction of the Court, and is the object of a suit, into whose ever hands it may have come, or in whatever manner it may have been transferred, *ib.*

8. And it makes no difference, whether the application to the court be made by the husband or his representatives, or assignees, in order to obtain possession of the property; or whether it be by the wife or her trustee, seeking a provision for her out of the property, *ib.*

9. This equity of the wife is equally binding, whether the transfer of the property be by operation of law, or by the act of the party, to general assignees, or to an individual; or, whether the particular transfer was voluntary, or made upon a good and valuable consideration, *ib.*

10. The court may, in its discretion, give the whole, or a part only, of the property to the wife, according to the circumstances of the case, *ib.*

11. When the husband lives with his wife, and maintains her, and has not misbehaved, the course is, to allow him to receive the interest and dividends on her property, *ib.*

12. As where bank stock settled by a father, on his infant daughter, placed in the hands of the assistant register of the court, as trustee, to execute the trusts declared in her favour by the deed of settlement, was, within one year after her marriage, and while she was an infant, sold and transferred by her husband and her, for a valuable consideration, the assignee knowing, at the same time, of the deed of settlement and the infancy of the wife, the assignment, on a bill filed by the wife against her husband and his assignee, was declared to be null and void, so far as respected the wife's equity; and the husband having misbehaved himself, the dividends on the stock were di-

rected to be paid to the wife herself, until she came of age, with liberty for her to apply for such suitable provision out of the property, as might be determined, on the usual reference to a master. *ib.*

13. This equity of the wife stands upon the peculiar doctrine and practice of the Court, rather than on any general reasoning. *ib.*

Vide DOWER. LEGACY.

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Vide PLEADINGS, II.

CHAMPERTY.

1. An agreement between an *attorney* and his *client*, amounting to *Champerty*, cannot stand in a Court of Equity. *Arden* v. *Patterson*, 44.
2. Where an attorney purchases from his client the whole subject matter of controversy, for his own benefit, though he may have some interest of his own, it is *Champerty*. *ib.*

Vide ASSIGNMENT.

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CONTRIBUTION.

1. If A. against whom there is a judgment, being seized of lands, sells part of them, and dies seized of the residue, his *heirs* are bound to satisfy the judgment, as far as the assets descended to them are sufficient for that purpose; and they are not entitled to any contribution from the purchaser of a part of the lands of their ancestor, for they stand in his place; and there is no equality of right between them and the purchaser, in respect to the judgment. *Clowes* v. *Dickenson*, 235
2. If there are several heirs, and the judgment creditor collects the debt from a part of the inheritance allotted to one of them, such heir is entitled to contribution from his co-heirs. *ib.*
3. *It seems*, that between purchasers in succession, at different times, of different parts of the estate of the judgment debtor, there is no contribution, for there is no equality of right between them. *ib.*

Vide DOWER, 8. 9. AGREEMENT, 3.

CORPORATION.

1. A Corporation aggregate may be dissolved, within the period prescribed by its charter, by the death of all its members, or the destruction of an integral part of it, or by a surrender of its franchises into the hands of the government, or by a forfeiture for non-user or mis-user of its franchises; but in the latter case, the forfeiture must be judicially ascertained and declared. *Slee* v. *Bloom* and others, 366

2. A corporation may be dissolved for a breach of trust; but not until it has been called upon to answer. *ib.*
3. A corporation is not dissolved by an omission to elect trustees under its charter, for more than two years, while the members, constituting the integral part of the corporation, remain *in esse*; but the old trustees continue in office, until others are elected in their stead. *ib.*
4. Though a corporation may forfeit its charter by an abuse or neglect of its franchises, yet such forfeiture must be ascertained and declared by regular process and judgment of law, before its powers can be taken away, or the corporation be considered as dissolved. *ib.*
5. The remedy against a corporation for a mis-user or non-user of its privileges, so as to work a forfeiture, is not in this Court, but at law, by a *scire facias* prosecuted at the instance and in behalf of the government, not on the application of an individual. *ib.*
6. The *Dutchess Cotton Manufacturing Company* were incorporated, for twenty years, under the act of March 22, 1811, (Sess. 34. ch. 67. 1 N. R. L. 245.) by the seventh section of which it is declared, that "for all debts of the company, at the time of its dissolution, the persons then composing the company, shall be individually responsible to the extent of their respective shares of stock in the company."—At a meeting of the trustees of the company on the 18th August, 1817, at which the plaintiff (a judgment creditor of the company, and one of the trustees) was present, it was resolved, that any of the stockholders who had paid the sums called for on their shares, then amounting to 50 per cent. should not be proceeded against for any further calls, except by way of forfeiture of their stock. By another resolution of the trustees of the 3d November, 1817, the stockholders were to have the privilege of forfeiting their stock, on paying 30 per cent. on the amount subscribed by them: *Held*, that even if the corporation were dissolved by lapse of time, the plaintiff, as a creditor, could not enforce his claim against the individuals, beyond the extent of the resolution of the trustees, and to which, as one of the trustees, he had assented; and that the stockholders who complied with the terms of the resolution of the 3d November, 1817, ceased to be members of the company or owners of shares, and were, therefore, not individually responsible. *ib.*

Vide PRACTICE, I. 2.

COSTS.

1. Where a demurrer to the plaintiff's bill is allowed, on the ground that the relief, if any, is at law, the defendant is entitled to his taxable costs. *Gregory and Withers* v. *Reeve and Hull*, 232
2. To a bill to correct a mistake in a deed, the defendants put in their answer, and also, filed a cross bill for discovery. The plaintiff in the original bill, as of course, without notice, dismissed his bill: *Held*, that the

defendants were entitled to costs on the dismissal of the plaintiff's bill, and also to the costs of their cross bill, as part of their defence in the original suit. *Ferris* v. *Nelson*, 262

3. Although the plaintiff was entitled to file his bill for an account and distribution; yet, where the charges of fraud, collusion, and misconduct, against the defendants, which formed the main ground of the suit, were proved to be false, unjust, and vexatious, the bill was dismissed, with costs, as to the defendants not liable to account; and the defendant who was accountable as trustee, was allowed all his taxable costs, extra charges, and expenses, out of the fund, before distribution. *Minuse* v. *Cox*. 441

CREDITOR.

Vide DEBTOR AND CREDITOR.

COURT (CIRCUIT) OF THE UNITED STATES.

Vide PRACTICE,

COVENANT.

Vide INFANT.

D.

DEBTOR AND CREDITOR.

1. A judgment creditor is not entitled, in equity, to enforce payment of the judgment against the land of a subsequent purchaser, as long as there is sufficient property of the debtor remaining unsold to satisfy the judgment. *Clowes* v. *Dickenson*, 235

2. The creditor, in such case, is entitled to resort to the land of the debtor, to the extent only of his debt which may remain unpaid after the estate of the debtor has been exhausted. *ib.*

3. The plaintiff purchased two lots of land of *V.* against whom there was an existing judgment. All the real estate of *V* (the residue of which was more than sufficient to satisfy the judgment,) was sold, subject to all incumbrances, under a subsequent judgment, to the defendant, who, afterwards, took an assignment of the prior judgment, and issued execution thereon, under which the two lots of the plaintiff were sold to the defendant, who made improvements thereon, and sold one of the lots: *Held*, that though the court would have interposed and prevented the sale of the two lots of the plaintiff, if he had applied in due season for that purpose; yet, as he knew of the sale, at the time, and delayed four years, before he filed a bill for relief, the court refused to disturb the sale, or to direct a reconveyance of the lots to him; but the defendant was ordered to pay the plaintiff, as an equitable indemnity, under the circumstances of the case, the sum for which the lots were sold, with interest from the time. *ib.*

4. A judgment creditor who has issued an execution, which has been returned *nulla bona*, acquires a priority of right to the property of his debtor, in the hands of a trustee, and any pay-

ments made by the trustee to the debtor, after a bill by such judgment creditor, or after notice of such right, are in his own wrong, and of no avail against such creditor. *Spader* v. *Davis*, 280

5. A judgment, or other security, may be taken and held for future advances or responsibilities. *Brinkerhoff* v. *Marvin*, 320
6. But *it seems*, that advances made, or responsibilities incurred after a subsequent judgment, will not be covered by such judgment security. *ib.*
7. Where a creditor has separate judgments against each of two partners, the partnership property will be bound to the same extent, as if the amount of both judgments had been included in a joint judgment against both partners. *ib.*
8. Where there are two judgment creditors, one of whom holds personal property of the debtor, as collateral security, the court will not confine him to the personal property, or restrain him from prosecuting his remedy under the judgment, until such personal property is exhausted, or the rights concerning it are first settled, if he offers to substitute the other judgment creditor in his place, on being paid the amount of his debt. *ib.*

Vide DEED. CONTRIBUTION. FRAUDULENT CONVEYANCES. JURISDICTION, 9.

DECREE.

Vide PRACTICE, VI.

DEED.

1. A general recital in a deed does not conclude a party, though the recital of a particular fact may estop him. *Huntington* v. *Havens*, 23
2. A recital cannot control the plain words in the granting part of a deed, *ib.*
3. As, where a deed of assignment by a debtor, in trust for creditors, recited that the debtor was desirous to convey his property to secure three of his creditors, by name, in full, and the residue for the benefit of his other creditors; and in the body of the deed, it was expressed to be in trust to pay and satisfy those three creditors, and three others, also named, and the residue to be divided among his other creditors; *Held*, that the three creditors named in the recital were only entitled to be paid rateably with the three other creditors named in the body of the deed, in proportion to their demands, *ib.*
4. *E.* a *soldier*, entitled to a lot of land, as a military bounty, in 1785, before the patent issued, by an agreement, sold the lot to *S.* and bound himself to execute a conveyance. *S.* sold and assigned the lot, bond, &c. in 1789, to *V.*, who, in 1790, by endorsement, sold and assigned the same, and all his right, title, and interest in the land, &c. to *C.* to whom he delivered the original bond and agreement and discharge of the soldier, and the patent issued in his name: *Held*, that, although, for want of words of inheritance, the assignment, *in law*,

transferred only an estate for life, yet as it was clearly the intention of the parties to convey the whole estate, a trust estate in fee was to be considered as created and conveyed; and the court would, therefore, decree an adequate legal conveyance in fee, according to the intention of the parties. *Higinbotham* v. *Burnet*, 184

5. *V.* in such case, having stood by for *thirteen* years, after the death of *C.* and seen his heirs claiming to be owners in fee, under *C.* and dealing with the land as absolute owners, and making very valuable improvements upon it, without disclosing any claim to the reversion, or any pretension of right or title, he, and all persons under him were held to be estopped, by his silence, from asserting his legal title. *ib.*
6. A defective conveyance by a person seised in fee, at the time, is good so as to bind the lands conveyed in the hands of the grantor and his heirs. *Wadsworth* v. *Wendell*, 224
7. It is good, also, against a subsequent purchaser, with notice of such prior defective conveyance. *ib.*
8. As where a soldier, entitled to military bounty land, under the several acts of the legislature, by an instrument in writing, purporting to be under his hand and seal, but to which no seal was affixed, for a valuable consideration, sold, quit-claimed, and confirmed unto the plaintiff his heirs and assigns for ever, all his right, title, claim and demand to, and for all the land to which he was entitled, as soldier, &c. with covenant for further assurance; (no patent having then issued for the land,) which instrument of conveyance was duly deposited in the office of the clerk of the county of *Onondaga*, on the 29th *April*, 1795, pursuant to the act of the 8th *January*, 1794, and, afterwards, on the 8th *March*, 1799, was duly proved; and the same grantor, on the 25th *October*, 1796, executed a deed in fee of the same land to *P.* under whom the defendants claimed title; *Held*, that although the first instrument, for want of a seal, was defective as a *legal* conveyance, yet it passed all the right and interest of the grantor *in equity*, the omission of the seal being a mistake, and contrary to the express intention of the parties; that the deposit of the instrument in the clerk's office, pursuant to the act, was legal notice to all subsequent purchasers of its contents, and equivalent, in this respect, to a registry of it; and that *P.* and those claiming under him were chargeable with notice of the prior conveyance to the plaintiff; and the defendants were, accordingly, decreed to release to the plaintiff all the right and title derived to them under *P.* *ib.*

DEMURRER.

Vide PLEADINGS, III. COSTS.

DEVISE.

1. There may be a limitation over by will, of a chattel interest, after a life estate therein. *Gillespie* v. *Miller*, 241
S. P. *Wescott* v. *Cady*, 334
2. A legatee in remainder, after an

estate for life, may call on the legatee for life for an inventory of the property to be filed. *Westcott* v. *Cady*, 334

3. As, where a creditor devised his house and lot to his wife; *also*, all his *personal* property, and, also, all the rents and profits of the house and farm at *N.*, for her support, during her natural life; and after her decease, he gave the same to his brother, *S.*, in fee, chargeable with certain legacies: *Held*, that the wife took the *use* only of the *personal* estate, which went, after her death, to the testator's brother. *Gillespie* v. *Miller*, 21

4. Where *J. S.* devised lands to *B.* for life, remainder to *C* in fee, but *if he died without an heir*, then to *D.* in fee: *Held*, that the devise over could not take effect as an executory devise, but created an estate tail, which, by the statute, was turned into a fee simple absolute. *Burnet* v. *Denniston*, 35

5. A testator devised all the rest and residue of his estate to his brother and sister, "to them and their heirs forever," all the children of his said brother and sister, to have an equal share in every thing he left; and if his brother died without children, the children of his sister should enjoy equally: *Held*, that the brother and sister took as tenants in common, not as joint tenants. *Westcott* v. *Cady*, 334

6. To give effect to a devise, the testator must not only be actually seised of the land devised, at the time of making his will, but must continue so seised to the time of his death. *Minuse* v. *Cox*, 441

7. A conveyance, therefore, by the testator of land devised by him is, so far, a revocation of his will, *ib.*

Vide WILL. TENANT IN COMMON.

DISTRIBUTION.

Vide EXECUTOR AND ADMINISTRATOR, 11.

DOWER.

1. This court follows the doctrine of the courts of law, that a mortgagor in possession of land mortgaged in fee, before foreclosure, has, in regard to all the rest of the world, except the mortgagee, the legal seisin; and in case of his death, while in possession, and before foreclosure, his widow is entitled to dower in the land mortgaged, of which she cannot be deprived by a purchaser of the equity of redemption of her husband: and the widow will, therefore, be allowed her dower out of the proceeds of the sale of the mortgaged premises. *Titus* v. *Neilson*, 452

2. As where the wife of a mortgagor joined in a mortgage in fee; and the mortgagor, afterwards, executed a second mortgage, in which she did not join; and there was a decree for a sale, on a bill filed by the first mortgagee, but before sale, the mortgagee died; *Held*, that his widow was entitled to her dower out of the surplus proceeds remaining after the first mortgage debt was satisfied. *ib.*

3. Though a widow's remedy for dower is, *prima facie*, in a court of law, yet, when the title is

admitted, and impediments are thrown in the way of her proceeding at law, this court will sustain a bill filed by her for dower. *Swaine* v. *Perine*, 482

4. An antenuptial agreement, that the intended wife shall exclusively enjoy property held by her as widow and administratrix of her former husband, and which is not expressed to be in lieu of dower, is no bar to her claim for dower in the estate of her second husband, *ib.*
5. A conveyance of land by the husband, during coverture, in trust for his wife to whom the trustee, afterwards, conveyed it, but which was not intended or accepted in lieu of her dower, is no bar to her claim of dower after his death. *ib.*
6. A deed given by the husband, just before his second marriage, to his daughter, without any consideration, and kept secret until after the marriage, is fraudulent and void, as against the wife's claim of dower. *ib.*
7. A release by the husband of his equity of redemption in lands mortgaged, not executed by the wife, though she joined in the mortgage, is no bar to her claim of dower in the equity of redemption or remaining interest of the husband in the land, after satisfaction of the mortgage. *ib.*
8. She is, however, bound to contribute rateably, to the redemption of the mortgage. *ib.*
9. Where the heir has redeemed the land, by paying off the mortgage, and the widow files her bill against him for dower, the mode in which she is to contribute, is, by paying during her life, to the heir, one third of the interest on the amount paid by him, to be computed from the time of such payment, or the value of such an annuity, according to the circumstances of the case, to be computed by the master. *ib.*
10. And the husband being considered as having died seised of the land, subject to the mortgage, the widow is entitled to one third of the rents and profits from the time of his death. *ib.*
11. After the death of a testator, who had, in his lifetime, purchased land, and given a bond and mortgage for the purchase money, his widow, who was sole executrix, and empowered to sell the estate to pay debts, &c. conveyed the estate to *S. M.* who gave his bond and mortgage for the same sum, which were accepted by the mortgagee in lieu of the testator's bond and mortgage, which were, therefore, given up and cancelled: *Held*, that the widow, in her account, as executrix, with the heirs, was not to be allowed the estimate of her dower in the land, as the heirs derived no benefit whatever from the sale. *Evertson* v. *Tappen*, 497
12. Where a widow and executrix was empowered to sell the real estate of the testator, to pay debts, &c. and to release her dower on such sale, and retain the value thereof out of the proceeds: *Held*, that the dower was to be computed according to the value of the property, at the time of her husband's death. *ib.*
13. An executrix suffered land, of which the testator died seized, subject to a mortgage, to be sold under the mortgage, and

became the purchaser thereof, in her own right, and sold it: *Held*, that she was liable to account to the heirs for the proceeds of the sale; but, as widow of the testator, she was entitled to her dower out of the proceeds, subject to her rateable contribution towards the extinguishment of the mortgage debt, *ib.*

E

EQUITABLE ESTATE.

Vide MORTGAGE. BARON AND FEME, 6, 7, 8, 9, 10, 11, 12, 13.

EQUITY OF REDEMPTION.

Vide MORTGAGE, II.

ESTATE TAIL.

Vide DEVISE.

EVIDENCE.

1. *Witness.*
2. *Presumptions.*

I. *Witness.*

1. Whether a naked trustee who is plaintiff, can be a witness, though liable for costs? *Cook* v. *Mancius*, 95

II. *Presumptions.*

2. Ignorance in a family of the existence of one of the children, who had gone abroad at the age of twenty-two, unmarried, and had not been heard of for upwards of forty years, is sufficient, with other circumstances, to warrant the court, or a jury, to presume the fact of his death without issue. *M'Comb* v. *Ogilvie*, 263
3. Presumptions arising from lapse of time, and the circumstances of the case, of the payment of a debt, are allowed as much in this court, as in a court of law. *Giles* v. *Baremore*, 545
4. Presumptions of payment, founded on lapse of time, are matter of evidence; and not, in most cases, *propio jure*, matter of plea in bar. *ib.*
5. Presumptions drawn by courts against stale demands are founded in justice and policy, *ib.*
6. Where a defendant, in his answer does not directly insist on the presumption of payment, but declares his entire ignorance as to the fact, and insists on his having a complete title to the premises mortgaged to secure the debts, having purchased, *bona fide*, from the mortgagor, without notice, &c. and had been in the quiet possession above thirty years: *Held*, that this was sufficient to entitle him to raise the objection, at the hearing, of a presumption of payment of the mortgage debt. *ib.*
7. Where a mortgage had been executed forty years, and there was an interval of thirty-five years from the time the state was supposed to have acquired an interest in the debt, by the attainder of the mortgagee, to the commencement of the suit, and no interest paid or demanded, the mortgage was presumed to have been satisfied, either to the mortgagee, before his attainder, or to the proper agents of the state, afterwards. *ib.*
8. A mortgage is no evidence of a subsisting title, if the mortgagee

never entered, and there has been no interest paid for twenty years, *ib.*

Vide TRUST. LACHES. LENGTH OF TIME AND POSSESSION. ADMINISTRATION.

EXECUTOR AND ADMINISTRATOR.

Power; duties and liabilities; actions by and against; accounts, allowances, and costs.

1. A devise to executors in trust for *C.* for life, and if she died without issue, then, in remainder over, with power to the executors, "to sell and dispose of so much of the real estate, as should be necessary to fulfil the will," is sufficient to authorize executors (the persons in remainder being infants) to execute leases for years of the real estate, for such terms, and upon such conditions as are reasonable and necessary to carry into effect the intentions of the testator, expressed in the will. *Hedges* v. *Riker*, 163.
2. But, without resorting to such a power, as necessarily implied in the will, this court, having a general jurisdiction over the property of infants, may authorize the executors to make such leases, with consent of the tenant for life, for the term of 21 years, or building leases, as should be deemed most beneficial to the interest of the tenant for life, and those entitled to the reversion, or remainder in fee. *ib.*
3. Where a person named as executor in a will, but who never qualified as such, took possession of part of the personal estate of the testator, and paid some of the debts: *Held*, that these acts were proof of his election to act as executor, and made him chargeable as executor. *Van Horne* v. *Fonda*, 388.
4. An executor or trustee cannot buy in mortgages, judgments, or other debts of the testator, for his own benefit, nor can he, in any way, deal or traffick with the estate, for his own emolument. *ib.*
5. An account taken before a master, pursuant to an order of the court, on petition of an executrix, when no suit was pending, is not binding on infant heirs, who may, on coming of age, file their bill against her for an account. *Evertson* v. *Toppen*, 497.
6. But where the father and guardian of the infant heirs attended, in their behalf, in taking such account before the master, it will not be opened, farther than may be necessary to correct such errors in it, as they may point out. *ib.*
7. An executrix suffered land of which the testator died seized, subject to a mortgage, to be sold under it, and became the purchaser thereof, in her own right, and sold it: *Held*, that she was liable to account to the heirs for the proceeds of the sale; but, as widow of the testator, was entitled to her dower out of the proceeds, subject to her rateable contribution towards the extinguishment of the amount of the mortgage debt. *ib.*
8. Where a testator devised to his wife the use and possession of all his estate, real and personal, during her natural life, or widowhood, and made her executrix:

Held, that she was accountable to the heirs for the use only of such part of the real estate, as the testator had acquired, after the date of the will; and that she was to be allowed in her account, for so much of the rents, and profits of such after acquired lands, as were applied by her towards the payment of the testator's debts, after the personal estate had been applied for that purpose and exhausted. *ib.*

9. Where the mother, as executrix, charges her children, being infant heirs, with board, clothing, &c. they are entitled to be allowed in account for the value of their labour and services. *ib.*
10. Compound interest is not allowed in favour of a trustee or executor, though it is some times permitted against him, when he refuses to disclose the profits he has made out of the trust property. *ib.*
11. The court connot interfere with the law of descent of real property or the established order of distribution of personal property, for the purpose of shifting the burden of paying the debts of the intestate, from the personal to the real estate, or to correct any alleged hardship or inequality produced by the law. *Thompson* v. *Tappen*, 518.
12. Where an *administratrix*, a few days after the death of the intestate, committed the entire possession and management of the estate to *R.* to whom she gave a power of attorney to collect the debts, &c. *Held*, that *R.* who admitted that he accepted the agency, as a friend or relation of the family, and from motives of benevolence, was not entitled to *commissions* on the moneys received and paid by him, nor any allowances for his services in relation to the estate. *Mason* v. *Roosevelt*, 534.
13. Such an agent, however, is not chargeable with *interest* on moneys belonging to the estate, received by him under the directions of the administratrix. *ib.*
14. *Aliter*, where he assumes to act as guardian of the infant *heirs*, and receives the rents and profits of the real estate. *ib.*
15. On a bill filed against such agent of the administratrix, by the heirs of the intestate, for an account, the testimony of the administratrix, though released by the plaintiff, is not, of itself, sufficient against the answer of the defendant. *ib.*
16. It *seems* that a release of the administratrix, as principal, in such a case, would be a discharge also, of the defendant, as her agent. *ib.*

Vide TRUST AND TRUSTEE. INFANT. TENANT IN COMMON.

EXECUTORY DEVISE.

Vide DEVISE, 3.

F

FACTOR.

A factor cannot pledge the goods of his principal, though the creditor has no notice of his being a factor. *Rodriguez* v. *Heffernan*, 417.

FEME COVERT.

Vide BARON AND FEME.

FORECLOSURE.

Vide MORTGAGE, II.

FRAUD.

1. Where *G.* and *W.*, the one by the purchase of a mortgage, and the other by the purchase of the equity of redemption, became possessed of the whole estate, and leased it to *C.* for a term of years, and *G.*, afterwards, assigned the mortgage, with notice of the term: *Held*, that the assignment was not a fraud on *C.* the lessee; and though the property was, afterwards, sold, on a bill of foreclosure filed by the assignee of the mortgage, and the terms thereby merged in the inheritance, yet, as *C.* himself became the purchaser at the sale under the decree, he thereby waived all right, if any he had, to relief for any damage he may have sustained by the loss of his term. *Chesterman* v. *G. & W. Gardner*, 29
2. The fraud, in such cases, which will entitle a party to relief, is a fraud at the time of the execution of the deed or lease, not a fraud in a subsequent and distinct transaction. *ib.*
3. Relief will not be afforded against a contract on the ground of fraud, unless it be made a distinct ground of allegation, and be put at issue in the pleadings. *Governeur* v. *Elmendorf*, 79
4. A mortgagee, to whom the mortgagor had, by an absolute deed, which was duly recorded, conveyed the premises, in fee, with full covenants, gave to the mortgagor a bond, conditioned that if the mortgagor paid to the mortgagee 400 dollars, on a certain day, the mortgagee would reconvey the premises; but the defeasance was not recorded: The mortgagee, afterwards, sold and assigned the bond and mortgage to C., and several years after, sold and conveyed the premises, in fee, by a deed with full covenants to *M.*, a *bona fide* purchaser, for a valuable consideration, without notice of the bond or defeasance, or of the assignment of the bond and mortgage to *C.*: *Held*, that the bond or defeasance, and the assignment of the bond and mortgage, were fraudulent and void, as against *M.* *Mills* v. *Comstock*, 214

FRAUDS, STATUTE OF.

Vide TRUST AND TRUSTEE. FRAUDULENT CONVEYANCES.

FRAUDULENT CONVEYANCES.

1. A voluntary conveyance made by a debtor, of his real estate, on a nominal consideration, *in trust*, to sell the same, and out of the proceeds to pay all his creditors who should come in and prove their debts, and execute releases of their demands, is fraudulent, and is not entitled to a preference over a previous judgment against the debtor, entered by confession, on a warrant of attorney, but without any *specification* of the particulars of the debt, as required by the statute; (sess. 41. ch. 259. s. 8.) for such a judgment is good as against the debtor himself, and is to be deemed fraudulent only as respects *bona fide* judgment creditors, and *bona fide purchasers*,

for a valuable consideration, that is, *purchasers*, in the usual and popular sense of the term, as distinguished from creditors. *Seaving* v. *Brinkerhoff*, 329

2. A deed by husband and wife of their joint estate, in trust, to pay all the debts of the husband, and the residue to the use of the wife and her heirs in fee, is a valid conveyance; and cannot be impeached by a subsequent purchaser without notice of the trust. *Rogers* v. *Benson*, 431

Vide DOWER, 6.

G

GIFT.

A gift for life of a chattel, is a gift of the usufruct only, except as to such articles, the use of which consists in the consumption. *Gillespie* v. *Miller*, 21

GUARDIAN.

Vide TRUST AND TRUSTEE. INFANT, 4, 5.

H

HEIR.

Vide DOWER. EXECUTOR AND ADMINISTRATOR. CONTRIBUTION.

I

INFANT.

1. Where a conveyance is directed to be made by infants, in performance of an agreement entered into by their ancestor, in his life time, who had stipulated to give a deed with full covenants, to the purchaser, the court will not order the infants to enter into personal covenants, but only to release and convey all the title whereof their ancestors died seised. *Matter of Ellison*, 261

2. The principal of the purchase money, in such case, was, however, ordered to be retained, subject to the further order of the court, or until the infants came of age, to provide an indemnity to the purchaser, in case the title should, in the meantime, fail. *ib.*

3. The court will not sustain a suit by an infant, for the *interest* due on a legacy, directed, by the will of the testator, to be applied to her education, when the amount is less than *fifty* dollars, and the party may sue the executor in a court of common pleas. *Fullerton* v. *Jackson*, 276

4. A *grandfather* has no right, under the statute, by his will, to appoint a guardian to his grandchild. *Fullerton* v. *Jackson*, 278

5. If the grandfather devises land to his grandchild, and directs the rents and profits thereof to be applied, by his *executors*, to the education of such grandchild, the executors, not the guardian appointed by the *surrogate*, are entitled to apply the rents and profits according to the direction of the will. *ib.*

6. And the court will not, on a bill filed by the infant and his guardian, direct the executors to pay over the rents and profits, to such guardian, but leave them

in the hands of the executors, until the infant comes of age. *ib.*

Vide EXECUTOR AND ADMINISTRATOR, 5. 9.

INJUNCTION.

I. *In what cases granted, and against whom.*
II. *To stay proceedings at law.*
III. *To stay waste or trespass.*
IV. *When dissolved, continued or renewed.*
V. *When made perpetual.*

I. *In what cases granted, and against whom.*

1. This court will grant and continue an injunction to enforce the statutes of this state giving an exclusive right to certain persons to navigate the waters of this state with *steam-boats*. *The North River Steam-Boat Company* v. *Hoffman*, 300

II. *To stay proceedings at law.*

2. Where *F.* was induced by the representation of *R.* that he had discovered a valuable *coal mine* on the bank of the *Ohio* river, to enter into a contract for the purchase of a tract of land, stated by *R.* to embrace the mine; and besides paying to *R.* 4400 dollars, *F.* covenanted to pay him one thousand dollars, annually, for twenty years; but which annuity was to cease, if after the mine was faithfully worked by *F.* it should not produce, at least, 12,000 chaldrons, &c. and the land was accordingly conveyed by *R.* to *F.* It appearing that there was, in fact, no coal mine within the boundaries of the land conveyed, though there was coal adjoining it, in the bed of the river, which was navigable, deep and rapid; but the working of the mine, if practicable, would be hazardous, expensive, and unprofitable; the contract on the part of *F.* was *held* to be founded in mistake and misrepresentation, and *R.* was perpetually enjoined from bringing any suit against *F.* to recover the annuity so agreed to be paid him. *Dale* v. *Roosevelt*, 174

III. *To stay Waste or Trespass.*

3. This court will not, unless under very special circumstances, grant an injunction where waste has been commited by a tenant, to prevent timber, which has been cut, from being removed. *Watson* v. *Hunter*, 169
4. In ordinary cases, the court interferes only to stay *future* waste. *ib.*

IV. *When Dissolved, Continued, or Renewed.*

5. Where an injunction has been voluntarily dissolved by the plaintiff, or having been dissolved by an order obtained by his agent or solicitor, without his knowledge or consent, but which was, afterwards, recognised and acted upon by him, the injunction will not be renewed upon his petition, without some new and special reasons, which did not exist when it was originally granted or dissolved. *Livingston* v. *Gibbons*, 250

6. An injunction to stay proceedings under a power to sell, contained in a mortgage, was retained, though it appeared that the mortgage had been discharged, until an action at law, brought by the plaintiff against the defendant on the covenant of seisin in his deed to the plaintiff, was decided. *Tillou* v. *Sharpsteen*, 260

V. *When Made Perpetual.*

7. Where one has a grant of a ferry, bridge, or road, with the exclusive right of taking toll, and another ferry, bridge, or road, is erected so near it as to create a competition injurious to such franchise, it is, in that respect, a nuisance; and this court will grant a perpetual injunction to secure the enjoyment of the statute franchise, and prevent the use of the rival establishment. *Newburgh Turnpike Co.* v. *Miller*, 101

INTEREST.

Vide TRUST AND TRUSTEE, II. 16. 19.

J

JOINT TENANTS.

Vide BARON AND FEME, 4. DEVISE, 4.

JUDGMENT.

Vide DEBTOR AND CREDITOR. CONTRIBUTION.

Judgment by confession, on warrant of attorney, *Vide* JURISDICTION, 9. USURY.

JURISDICTION.

1. A party has no remedy in this court, on the mere ground of a failure of title, if he has taken no covenant to secure the title, and there is no fraud in the case. *Chesterman* v. *Gardner*, 29
2. This court will not afford relief against a contract, because of fraud, unless it be made a distinct ground of allegation, and be put at issue in the pleadings. *Gouverneur* v. *Elmendorf*, 79
3. This court has original jurisdiction, to be exercised in sound discretion, to try all questions of fact without the intervention of a jury. *Smith* v. *Carl*, 118
4. It is not bound, except on bills for a divorce, for adultery, or an issue, *devisavit vel non*, to send a matter of fact to be tried by a jury, if it can decide, of itself, to its own satisfaction, upon the evidence; the aid of a jury being merely to inform the conscience of the court. *ib.*
5. This court does not, unless in a very special case, sustain a bill merely for the assessment of damages for the breach of an agreement. *Kempshal* v. *Stone*, 193
6. As, where the defendant, who had entered into an agreement with the plaintiff for the sale and conveyance of a lot of land, after the time of performance had elapsed, sold and conveyed the land to a third person, for a valuable consideration, without notice of the agreement: *Held*, that a specific performance could not be decreed; but the plaintiff must seek his remedy at law, for a

compensation in damages for the breach of the agreement. *ib.*

7. On a bill filed by the overseers of the poor of the town of *S.* against the overseers of the poor of the town of *B.*, for relief, on the ground of fraud, alleged to have been committed by a former overseer of the poor of the town of *B.*, upon the former overseers of the poor of *S.* in the apportionment of the money and poor of *B.*, pursuant to the provisions of an act for the division of that and another town, into three towns: *Held*, that this court could not give relief for or against the parties, in their individual capacities; but the remedy, if any between the two towns, was at law. *Gregory & Withers, &c.* v. *Reeves & Hull, &c.* 232
8. A suit by an infant for *interest* due on a legacy, directed by the will of the testator to be applied to her education, when the amount is less than *fifty dollars*, and for which she might sue in a Court of Common Pleas, will not be sustained in this court. *Fullerton* v. *Jackson*, 276
9. A court of law has an equitable jurisdiction over judgments by confession, entered upon warrants of attorney; and it may examine and decide as to the sufficiency of the *specification* required by the statute, (Sess. 41. ch. 250. s. 8.) to be filed with a judgment entered by confession on a warrant of attorney. And where different judgment creditors, by confession, appeared before the Supreme Court, and discussed their respective rights as to the priority of *lien* of their respective judgments, without objecting to the jurisdiction of the court, or to its competency to examine and decide, as to the validity of the specification filed with the plaintiff's judgment, the decision of the Supreme Court on the case will be deemed conclusive. *Brinkerhoff* v. *Marvin*, 320

L.

LACHES, LENGTH OF TIME AND POSSESSION.

C. purchased of *V.* a military lot, and though the whole estate was intended to be transferred, the assignment, for want of words of inheritance, conveyed only an estate for life; and *C.* entered and continued in possession of the land, until his death, having made valuable improvements thereon; and *V.* stood by, for *thirteen years*, after the death of C. seeing his heirs in possession claiming to be owners in fee under *C.* and dealing with the land as absolute owners, and making great improvements in the property, without disclosing any claim to the reversion, or any pretension of right or title, he, and all persons under him were *held* to be estopped by his silence, from asserting his legal title. *Higinbotham* v. *Burnet*, 184

Vide DEBTOR AND CREDITOR, 3. EVIDENCE, 11.

LEASE.

Vide FRAUD, 1.

LEGACY.

A testator, by his will, gave to his daughter, "during her separation from *W. C.* her husband, one thousand dollars, a year," which he charged on his real estate; and the daughter was, in fact, living separate from her husband, when the will was executed; but they, afterwards, lived together, and were living and co-habiting together, at the time of the testator's death; and about three months after his death, they again separated and continued to live separate for a year: *Held*, that the legacy depending on a separation which existed at the time the will was executed, and with a view to that fact, was lawful and proper; and the separation having ceased when the will took effect, by the death of the testator, there was an end of the legacy; and that a voluntary separation of the parties afterwards, would not entitle the wife to it. *Cooper* v. *Remsen*, 459.

LIEN.

Vide DEBTOR AND CREDITOR.

LIMITATION.

Vide DEVISE.

LIMITATION OF ACTIONS.

1. The statute of limitations does not apply to a direct trust, as between the trustee and *cestui que trust*; nor to parties standing in the relation of principal and agent or factor, and not in the proper relation of debtor and creditor, or of joint partners in trade. *Coster* v. *Murray & Murray*, 22.
2. Where goods in which both parties were interested, were sent to the defendants, who agreed to be accountable for the share of the plaintiffs, or the proceeds thereof, and to charge no commissions on the sale, *it seems* that this is not "a trade of merchandise between merchant and merchant," within the meaning of the exception in the statute. (*Sess.* 24 *ch.* 183. *s.* 5. 1 *N. R. L.* 184.) *ib.*
3. Whether the exception does not apply to other persons than merchants? *Quere.* *ib.*
4. Whether even *open* accounts between *merchants*, where the last item is above six years standing, are not within the statute? *Quere* *ib.*
5. If part of an open account be within six years, it draws after it items beyond six years, so as to protect them from the statute, *ib.*
6. To bring a case within the exception in the statute, there must be mutual accounts between the parties. *ib.*
7. Where all the items are on one side, the last item, though within six years, does not draw after it those of a longer standing. *ib.*

M.

MILITARY BOUNTY LANDS.

A deposit of a conveyance of military bounty land, pursuant to the act of the 8th January, 1794, is equivalent to a registry of it, and operates as a notice to subsequent purchasers. *Wadsworth* v. *Wendell*, 224.

Vide DEED.

MORTGAGE.

I. *Of the mortgage generally.*
II. *Equity of redemption, foreclosure and sale.*

I. *Of the mortgage generally.*

1. *P.* gave a mortgage of land, the title to which was in *S.* who was in possession thereof with *P.*; and *S.*, if he was not present and assenting to its execution, treated it, afterwards, as a valid and subsisting mortgage, and voluntarily paid part of the money due on it; *Held*, in a suit by the mortgagee against *P.* and *S.* for a foreclosure and sale, that *S.* was estopped from setting up his title to the premises, in avoidance of the mortgage. *Lee* v. *Porter and Stiles*, 268
2. A mortgage was given in 1814, by *P.* one of the occupiers of a lot of land, for a rateable proportion of money due on a former mortgage covering the whole lot, of which the premises in question were only a part, which former mortgage was given to *B.* in 1799, in renewal of a prior mortgage of the lot in 1794, to *R.* who had assigned it to *B.*: *Held*, that though *R.* claiming under the grantee of the patentee, whose title to the land had become forfeited to the state, by his attainder, and, therefore, the mortgage by *P.* might be said to be without consideration; yet *P.* being fully apprised of the state of the title, when he gave the mortgage, could not set up the defence against the plaintiff, a *bona fide* purchaser of the mortgage, especially, as he had, with other occupiers of the lot, in a petition to the legislature, stated, that he had satisfied the mortgage to *B.* *ib.*
3. It *seems*, that the court will not relieve against a mortgage, on the ground of an outstanding claim, which the mortgagor, for greater security to his title, had bought in, without any judicial investigation, or decision on such claim, in a suit in which all proper persons would be made parties, and called on to bring forward their title. *ib.*
4. A deed from the state, pursuant to an act of the legislature, reciting that the title to certain lands were vested in the state by the attainder of *J. W* and that such title had been perfected by the removal of incumbrances, and directing the surveyor general to convey the land, &c. cannot be set up as a defence to defeat a *bona fide* mortgage on the land; for such an act cannot devest the title of persons holding adversely, without a regular eviction in the ordinary course of law. *ib*
5. The courts of law having decided, that a mortgagor in possession of land mortgaged in fee, before foreclosure, or entry by the mortgagee, has, (in regard to all the rest of the world, except the mortgagee) the legal seisin, and that his equity of redemption might be sold in execution; and that in case of his death, while in possession, and before foreclosure, his widow was entitled to her dower in the land mortgaged, of which she could not be deprived by a purchaser of the equity of redemption of her husband, this court follows the doctrine of the courts of law, and allows

the widow her dower out of the proceeds of the sale of the mortgaged premises, on a bill for foreclosure and sale. *Titus* v. *Nelson*, 452

6. As where the wife of a mortgagor joined in a mortgage in fee; and the mortgagor, afterwards, executed a second mortgage of the same premises, in which the wife did not join; and after a decree for sale, on a bill filed by the first mortgagee, but before a sale, the mortgagor died; *Held*, that the widow was entitled to her dower out of the surplus proceeds remaining, after the first mortgage debt was satisfied. *ib.*

7. A mortgage is no evidence of a subsisting title, if the mortgagee never entered, and there has been no interest paid for twenty years. *Giles* v. *Baremore*, 545

8. Where a mortgage had been executed forty years, and thirty-five years had elapsed from the time the state was supposed to have acquired an interest in it, by the attainder of the mortgagee, and there had been no interest paid or demanded, payment of the mortgage debt was presumed. *ib.*

9. Though a mortgagee may, by way of extinguishment, release all his interest to the mortgagor; yet he cannot convey it as a subsisting interest, absolutely, or by way of mortgage to a third person; especially when the mortgage has not become absolute, and there has been no foreclosure. *Aymar* v. *Bill*, 570

10. For the debt cannot reside in one person, and the pledge in another. *ib.*

11. *Equity of redemption, foreclosure and sale.*

11. Where the mortgagee takes a release of the equity of redemption from the mortgagor by a deed for a full consideration and with full covenants, the mortgage debt is considered as merged in the estate, and satisfied by the purchase, unless there be very precise proof to the contrary; and more especially, where no claim has been set up for six years after the purchase. *Burnet* v. *Denniston*, 35

12. Where a subsequent judgment or mortgage creditor offers to redeem, the mortgagee cannot *tack* a debt due to him from the mortgagor, and secured by another mortgagor on other property, nor any debt which is not a charge on the premises sought to be redeemed, or of which such subsequent judgment or mortgage creditor was not bound to take notice. *ib.*

13. Where such subsequent creditor tenders to a mortgagee the full amount of the debt and interest due on the prior mortgage, with the costs and charges, which the mortgagee refuses to accept, unless another debt due to him from the mortgagor, not charged on the premises, is also paid; but proceeds to sell the land under a *power* of sale contained in the mortgage, such sale is irregular and void. *ib.*

14. Where the *advertisement* of sale of mortgaged premises, under a *power* of sale, states a false assertion, as, that the premises are to be sold for default as to

three mortgages, when there are only *two*, the third mortgage being on other land, by which the public may be misled, or purchasers deterred from bidding, the sale will be irregular and void. *ib.*

15. So, if no *place* of sale is designated in the advertisement, or if the mortgagor was not twenty-five years of age when he executed the mortgage, a sale under a *power* will create no bar to the equity of redemption under the statute. *ib.*
16. An incumbrancer, *pendente lite*, is not entitled to redeem, and, therefore, need not be made a party to a bill of foreclosure, unless under special circumstances; as where he became a judgment creditor after the commencement of the suit, but before the decree, and the purchaser at the master's sale, had previous notice of the judgment, and by a previous agreement with the mortgagor, obtained from him an order for the surplus moneys which was accepted by the purchaser. *ib.*
17. Where the mortgagor executes an absolute deed to the mortgagee for the same land, with full covenants, the legal and equitable title being united in the same person, the latter is merged in the former. *Mills* v. *Comstock*, 214

Vide NOTICE. DOWER.

N

NOTICE.

The possession of a tenant is notice to a purchaser of the reversion of the actual interest of the tenant; and the purchaser is bound to admit every claim of the tenant which he could enforce against the vendor. *Chesterman* v. *Gardner*, 29

Vide DEED.

NUISANCE.

Vide INJUNCTION, V.

P

PARTNERSHIP.

1. The assignees of a bankrupt partner, under a separate commission, are tenants in common with the *solvent* partner; and where the assignees have got possession of the partnership funds, the solvent partner cannot call them out of their hands, or compel them, or partnership debtors who have settled with them, to account. *Murray* v. *Murray*, 60
2. The *solvent* partner is entitled, as against his co-partner, only to his share of the *surplus*, after the partnership debts are paid. *ib.*
3. The *solvent* partner and the assignees of the bankrupt must join in a suit at law, *ib.*
4. The assignees of the bankrupt have higher equities in such case, than ordinary tenants in common, for the purpose of an equal rateable distribution of the joint funds, &c. *ib.*
5. Where the assignees of a bankrupt partner brought a suit to recover property in the hands of trustees, to which suit the *solvent* partner was made a party, and demurred to the bill on

the ground that the funds of the partnership ought not to be paid to the assignees of the bankrupt, which demurrer was overruled; and after answer, an account was taken, and the trustees settled the amount with the assignees: *Held*, that the *solvent* partner was concluded by the decree and settlement in that suit, and could not re-assert his claim in a collateral action. *ib.*

6. Where a creditor has separate judgments against each of two partners, the partnership property will be bound to the same extent as if the amount of both judgments had been included in a joint judgment for the whole, against both partners. *Brinkerhoff* v. *Marvin*, 320

Vide AGREEMENT, 1. ASSIGNMENT, 4.

PAYMENT.

Vide EVIDENCE, II.

PLEADINGS.

I. *Parties.*
II. *Bill.*
III. *Demurrer.*
IV. *Plea.*
V. *Answer.*

I. *Parties.*

1. An incumbrancer, *pendente lite*, need not be made a party to a suit for the foreclosure of a mortgage. *Cook* v. *Mancius*, 89
2. The court does not take notice of a purchaser of the subject matter pending the suit. *ib.*
3. Where a trustee and his *cestui que trust*, as plaintiffs, file their bill, and pending the suit, the *cestui que trust* assigns his interest to another, it is no objection at the hearing, that the latter was not made a party. *ib.*
4. In a suit by the husband for the wife's distributive share, the wife must be made a party. *Schuyler* v. *Hoyle*, 196

II. *Bill.*

5. *L.* and *T.*, assignees of *B.*, filed a bill to foreclose a mortgage against *W.* who put in his answer, and then filed a bill against *L.* and *T.* for relief against the mortgage, and also, against a judgment and execution. *W.* died before any decree to account in the suit to foreclose: *Held*, that the bill filed by *W.* partook of the nature of an original as well as a cross bill, and that his legal representatives might file a *bill of revivor* against *L.* and *T.* to which they must answer. *Woolsey* v. *Livingston & Thompson*, 265
6. A bill of *revivor and supplement*, is a compound of a supplemental bill and bill of revivor, and not only continues the suit which has been abated by the death of a plaintiff, &c. but supplies any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case. *Westcott* v. *Cady*, 334

III. *Demurrer.*

7. Where there is a general demurrer to the whole bill, and it is bad in part, the whole will be overruled. *Higinbotham* v. *Burnet*, 184
8. If a bill is for discovery only,

and not for relief, a demurrer to the whole bill is bad. *ib.*

9. Where the bill is for discovery and relief, the defendant should answer as to the discovery, and demur as to the relief. *ib.*

IV. *Plea.*

10. Presumption of payment, founded on lapse of time, is matter of evidence, and not, in most cases, *proprio jure*, matter of plea in bar. *Giles* v. *Baremore*, 545

11. A plea may be good in part and bad in part; and where a plea is more extensive than the subject matter to which it relates, it will be allowed to stand as to so much of the bill to which it properly applies; and the defendant must answer to the residue. *French* v. *Shotwell*, 555

V. *Answer.*

12. A defendant, as to facts within his knowledge, must answer as to his *information* and *belief*, if he has any information on the subject, distinct from the bill. *Smith* v. *Lasher*, 247

13. It is not sufficient to answer as to certain specific facts charged in the bill, "that they may be true, &c., but the defendant has no knowledge of, but is a stranger to the foregoing facts, and leaves the plaintiff to prove the same." *ib.*

14. Nor is it sufficient to say, "the defendant has not any knowledge of the foregoing facts, but from the statement thereof in the bill;" but the defendant should answer to his information and belief, and admit or deny any information *dehors* the bill. *ib.*

15. Where a defendant, in his answer, does not directly insist on the presumption of payment, nor waive the benefit of it, but insists on his ignorance of the fact, necessarily arising from his being a stranger to the transaction, and upon the staleness of the demand, he may raise the objection of a presumption of payment at the hearing. *Giles* v. *Baremore*, 545

POWER.

Vide EXECUTOR AND ADMINISTRATOR, 1, 2.

Power of sale in a mortgage, *Vide* MORTGAGE.

PRACTICE.

I. *Removal of a Cause into the Circuit Court of the United States.*
II. *Motions, Petitions, and Orders.*
III. *Taking testimony, feigned issue, and other intermediate proceedings.*
IV. *Hearing and Rehearing.*
V. *Reference to a Master, Report, and Exceptions.*
VI. *Decree.*

I. *Removal of a Cause into the Circuit Court of the United States.*

1. If some of the parties, plaintiffs and defendants, respectively, are citizens of the same state, the cause cannot be removed from the state court to the Circuit Court of the United States. *The North River Steam Boat Company* v. *Hoffman*, 300

2. Where a *corporation* are plaintiffs, it must appear that all persons jointly interested are enti-

tled to sue in the Courts of the United States, in order to give a Circuit Court of the United States jurisdiction of the cause, or to entitle a defendant in a State court to remove the cause into the Circuit Court of the United States. *ib.*

II. *Motions, Petitions, and Orders.*

3. An irregularity of practice, or defective notice, will be cured by a neglect to complain of it, in due season. *Skinner* v. *Dayton*, 191
4. As, where a party who had not received due notice of the examination of witnesses before commissioners, suffered *ten months* to elapse, before making application to the Court; he was *held* to have waived, by this delay, all right to cross-examine the witnesses, or to object to the irregularity. *ib.*
5. A motion by the plaintiff to have his name struck out of the bill, because it was inserted without his knowledge or consent, is too late, after publication passed, and when the plaintiff knew that his name was used, immediately after the bill was filed, and suffered more than a year to elapse before he made his application. *Sears* v. *Powell*, 259

III. *Taking testimony, feigned issue, and other intermediate proceedings.*

6. A motion for a second trial of a feigned issue directed by the court, to try the validity of a will, made the second term after that in which the *nisi prius* record and judge's certificate had been filed, and upon an *exparte* statement of the evidence given at the trial, was denied, on the ground of delay, and the want of the proper document. *Van Alst* v. *Hunter*, 148
7. A new trial may be moved for and granted at the final hearing on the equity reserved. *ib.*
8. Though it is the most usual course to award a second trial on a feigned issue, in cases touching the inheritance, where the verdict is in favour of the will and against the heir at law; yet it rests entirely in the discretion of the court to award a second trial or not, according to the circumstances and testimony in the case. *ib.*
9. Notice of the rule to *pass publication*, must be served on the defendant's *solicitor*, or his *agent*; and if it is served on the agent, the time of service must be *double*, as in other cases, or for *six* weeks. *Billings* v. *Rattoon*, 189
10. Where a party, who had not received due notice of the examination of witnesses, before Commissioners, suffered ten months to elapse, before making application to the court, he was held to have waived, by this delay, any right to cross-examine the witnesses, or to object to a want of notice. *Skinner* v. *Dayton*, 191

IV. *Hearing and Rehearing.*

11. Affidavits taken *exparte*, after a cause has been set down for a final hearing, are inadmissible. *Minuse* v. *Cox*, 441

V. *Reference to a Master; Report and Exceptions thereto.*

12. Objections to the admissibility of evidence before a master, not made the ground of exception on the report being filed, will be considered as waived, and cannot be made at the final hearing. *Minuse* v. *Cox*, 441

VI. *Decree.*

13. A decree can never be impeached by an original bill, or in another suit. *Murray* v. *Murray*, 60

14. A decree or judgment, by consent, is binding and conclusive, unless procured by fraud. *French* v. *Shotwell*, 555

Vide PARTNERSHIP, 5.

PRESUMPTION.

Vide LACHES, LENGTH OF TIME, AND POSSESSION. EVIDENCE, II.

PROMISSORY NOTES.

1. A person receiving negotiable paper, in the usual course of trade, for a fair and valuable consideration, from an agent or factor having no authority to transfer them, but without knowledge of that fact, or notice of the fraud, may hold them against the true owner. *Bay* v. *Coddington*, 54

2. But where *R.*, as agent of *B.*, having received negotiable notes to be remitted to *B.*, delivered them to *C.* as security against responsibilities as endorser of certain notes of *R.*, who had then stopped payment, and became insolvent, but on which notes of *R.*, *C.* had not then become chargeable, it was *held*, that though *C.* had no knowledge that the notes deposited with him belonged to *B.*, but believed *R.* to be the true owner of them, yet he was not entitled to hold them as against *B.*, the lawful owner, but was accountable for the amount with interest, as he did not receive them in the regular course of trade, or in payment of an existing debt. *ib.*

R

REFERENCE.

To a Master, *Vide* PRACTICE, V.

REHEARING.

Vide PRACTICE, IV.

RES JUDICATA.

The decision of a court of law, on a summary application to its equity, by motion and affidavit, is not such a *res judicata* as will conclude this court from any inquiry into the case. *Arden* v. *Patterson*, 44

Vide JURISDICTION, 9.

REVOCATION.

Of a will implied, *Vide* DEVISE, 7.

S

STATUTE.

Construction of.

1. The word "may" in a statute means *must* or *shall*, in those cases only where the public are interested, and the public or third persons have a claim, *de jure*, to have the power exercised. *Newburgh and Cochecton Turnpike Company* v. *Miller*, 101

2. But the words "shall or may," in a private trust, leave it optional with the trustees. *ib.*

PARTICULAR STATUTES CONSTRUED, EXPLAINED, OR CITED.

3. The act "to prevent abuses in the practice of the law," &c." passed *April* 21, 1818, (sess. 41. ch. 259. sec. 8.) is not to be extended by construction. *Seaving* v. *Brinkerhoff*, 329

4. Judgments entered up by confession, or warrant of attorney, without the *specification* of the particulars of the debt, required by that act, are good as against the debtor himself, and are fraudulent only as respects *bona fide* creditors and *bona fide purchasers*, in the usual and popular sense of the term *purchaser*, as distinguished from creditor. *ib.*

1784, May 11. Sess. 7. ch. 63. (Military Bounty Lands.) 227

1786, February 3. Sess. 9. ch. 12. (Joint tenants.) 431

1790, April 6th. Sess. 13. ch. 59. (Military Bounty Lands.) 228

1794, January 8. Sess. 17. ch. 1. (Military Bounty Lands.) 221, 229

1794, March 27. Sess. 17. ch. 44. (Military Bounty Lands.) 228

1801, March 20. Sess. 24. ch. 36. (N. & C. Turnpike Company,) 107

——, March 30. Sess. 24. ch. 87. (Champerty.) 48

1806, February 18. Sess. 29. ch. 29. (N. & C. Turnpike Company,) 107

1811, March 22. Sess. 34. ch. 67. (Incorporated Manufacturing Companies,) 366

1813, March 19. Sess. 36. ch. 32. (Mortgages,) 220

——, April 5. Sess. 36. ch. 75. (Distribution of intestate estates,) 277

——, April 10. Sess. 36. ch. 91. (Turnpike Companies,) 110

1815, March 17. Sess. 38. ch. 79. (Newburgh & Cochecton Turnpike,) 108

1817, April 15. Sess. 40. ch. 245. (Freemason's Patent,) 275

1818, April 3. Sess. 41. ch. 81. (Freemason's Patent,) 274

——, April 21. Sess. 41. ch. 259. (Abuses in the Practice of the Law. Judgments by confession,) 324, 329

STEAM BOATS.

This court will grant and continue an injunction to enforce the statutes of this State giving an exclusive right to certain persons to navigate the waters of this State with steam-boats. The *North River Steam Boat Company* v. *Hoffman*, 300

SURETY.

Vide BAIL.

TENANT.

Vide NOTICE.

TENANT IN COMMON.

Admitting that one tenant in common may, in a particular case, purchase in an outstanding title, for his own benefit; yet where two devisees are in possession of land, under an imperfect title derived from their common ancestor, one of them cannot buy up an outstanding or adverse title, to disseise or expel his co-tenant; but such purchase will enure to their common benefit, subject to an equal contribution to the expense. *Van Horne* v. *Fonda*, 388

Vide DEVISE, 4.

TRUST AND TRUSTEE.

I. *How trusts are created, and their incidents.*

II. *Trustee; his accounts, allowances to, and charges against him.*

I. *How trusts are created, and their incidents.*

1. Though a trust need not be created by writing; yet, to take the case out of the statute of frauds, its terms and conditions must be clearly manifested and proved in writing, under the hand of the party to be charged, before the court will carry it into execution. *Steere* v. *Steere*, 1
2. Loose and general declarations of intention, by one member of a family, of holding property in trust, for the other members, are not sufficient for the deduction of a trust which a court of equity will recognize and enforce. *ib.*
3. Letters and accounts addressed by a person to his brother, were held, under the circumstances, insufficient to raise a trust, by implication, to the father. *ib.*
4. To raise a trust by implication, or operation of law, an actual payment or loan of money by the *cestui que trust*, at the time of the purchase, must be shown. *ib.*
5. Parol evidence to contradict the inference as to a trust, deduced from written documents, is inadmissible. *ib.*
6. But where written documents are loose and ambiguous, parol evidence is admissible to show the understanding of the parties. *ib.*
7. Where the responsibility of a trustee, or guardian, or that of his sureties, becomes precarious, the court, on a bill filed by the infants, for that purpose, will order the moneys in the hands of the trustee or guardian, to be brought into court, to be put out for the benefit of the parties interested, or that the further and sufficient security be given by the trustee or guardian. *Monell* v. *Monell*, 283.

II. *Trustee; his accounts; allowances to and charges against him.*

8. Payments by a trustee of a debtor, after a bill filed by a director who had obtained judgment and issued execution against such debtor, or after notice of the priority of right acquired by such creditor, are made in his own wrong, and of no avail against such creditor. *Spader* v. *Davis*, 280
9. If two trustees, executors or guardians, join in a receipt for money, it is presumptive evidence that the money came equally into their possession, or

under the controul of both ; and there must be direct and positive proof to rebut such presumption : The *answer* of the defendant is not sufficient for that purpose. *Monell* v. *Monell*, 283

10. If one trustee clearly proves, that his joining in the receipt, was necessary and merely formal, and that the money was, in fact, paid to his co-trustee, without his direction or consent, and that it was out of his power to control or secure the money, he will not be responsible. *ib.*

11. Where by any act or agreement of one trustee or executor, money gets into the hands of his co-trustee, or co-executor, both are answerable for it. *ib.*

12. Where land was conveyed to the defendant, in trust to sell the same, " at auction or otherwise, in whole or in parcels, on giving three week's notice thereof;" *Held*, that the direction, as to notice, applied only to a sale by public auction, and that the trustee having a discretion, a private sale by him, without any notice, was valid. *Minuse and Others against Cox*, 441

13. Where a trustee is directed to sell, on giving public notice, &c. a sale by him, without such notice, will be valid, so as to confer a good title on the purchaser : but the trustee will be responsible for any deficiency in the price, below the real value of the land sold by him. *ib.*

14. Where there is no unreasonable delay by a trustee in applying the trust moneys, according to the directions of the trust deed, and he does not apply the moneys to his own use, he will not be charged with interest. *ib.*

15. The estate of *C.* was directed to be sold, and the proceeds to be paid to *T.* to pay incumbrances and expenses, and the residue, in trust, for the creditors of *C*, and the *surplus*, if any, in *trust* for the wife of *T.* ; *T* purchased in the whole estate, at one bid, and, by assuming to pay their debts, prevented the creditors from bidding, and all competition at the sale, so that the real value of the estate, at auction, could not be ascertained, nor whether any, nor what *surplus* remained in trust for the wife ; and *T.* continued to hold the estate, exclusively as his own, until his death : *Held*, that the wife of *T.* was entitled to consider the land, or so much thereof as remained unsold to pay the debts of *C.* as her own, discharged from any claim of the husband or his heirs. *Evertson* v. *Tappen*, 497

16. Compound interest is not allowed in favour of a trustee, though it is sometimes permitted against him, when he refuses to disclose the profits he has made out of the trust property. *ib.*

17. An executor or trustee cannot buy in land of the testator, on a sale under an incumbrance, for his own benefit. *ib.*

18. A person to whom the *administratrix* committed the entire possession and management of the estate of the intestate, and who admitted that he accepted the agency, from motives of benevolence, and as a friend and relation of the family, is not entitled to *commissions* on moneys received and paid by

him, nor any allowance for his services in relation to the estate. *Main* v. *Roosevelt*, 534

19. Such an agent or trustee is not chargeable with *interest* on moneys belonging to the estate received by him under the direction of the administratrix. *ib.*

20. But if he assumes to act as guardian of the infant heirs, and receives the rents and profits of the real estate, he is chargeable with interest. *ib.*

Vide EXECUTOR AND ADMINISTRATOR, 4. 10. 12. DEBTOR AND CREDITOR, 4.

U

USURY.

1. Where *D.* lent *F.* his promissory notes, and received the promisory notes of *F*, for the same amount, in exchange, and also a *commission of two and an half per cent.*, which exceeded the legal interest for the time the notes had to run, the transaction was held to be usurious, and the notes and other securities given by *F.*, void. *Fanning* v. *Dunham*, 122.

2. If the lender of money, on an usurious contract, seeks to enforce his securities in this court, and the borrower sets up the usury, as a defence, and proves it, the securities will be declared void and ordered to be deliver up and cancelled. *ib.*

3. But where the lender has proceeded at law, and recovered a judgment, on a bond and warrant of attorney, or is proceeding to forclose a mortgage, by virtue of a power of sale, under the statute, without the aid of this court; and the borrower files his bill for relief against the judgment, or other legal securities, on the ground of usury, he must, before he can be entitled to relief, pay, or offer to pay, the principal and interest lawfully due; and that, whether the usury be established by proof, or be admitted in the defendant's answer. *ib.*

4. Practice of courts of law, in interfering to set aside judgments by confession on bonds and warrants of attorney, on the ground of usury. 137.

5. Where a party to a judgment entered upon a warrant of attorney, voluntarily waives his defence on the ground of fraud or usury, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it, or to investigate the merits of the original transaction, between the original parties. *French* v. *Shotwell*, 555.

6. As, where a party against whom a judgment had been entered by confession, or warrant of attorney, founded on an usurious consideration, filed a bill for relief against the judgment, on the ground of usury; and, afterwards, voluntarily consented to a decree, dismissing the bill, with costs: *Held*, that a subsequent purchaser of the land on which the judgment was a *lien*, could not impeach it on the ground of usury or fraud. *ib.*

VENDOR AND PURCHASER.

A vendor of land selling in good faith, is not responsible for the goodness of his title, beyond the extent of the covenant in the deed. *Governeur* v. *Elmendorf*, 79.

Vide USURY.

WILL.

1. Extreme old age does not dis-

qualify a person from making a will. *Van Alst* v. *Hunter*, 158.
2. It is sufficient, if the testator possesses a competent understanding. 159.
3. A will and codicil are to be taken together, as parts of one and the same instrument. *Westcott* v. *Cady*, 334.

Vide DEVISE.

END OF VOLUME V.

ERRATA.

Page 32, line 34, for 'plaintiffs' *read* plaintiff.
——— 22, for 'G. W.' *read* G. G.
34, line 14, for 'leases' *read* lease.
36, line 8, before 'plaintiffs' *insert* three.
——— 26, for 'this mortgage' *read* these mortgages.
40, bottom line, for 'mortgage' *read* mortgagee.
45, line 2, 5, 23, for 'F.' *read* R.
——— 28, for 'P.' *read* S.
54, line 2, of the case, for 'carpenters' *read* co-partners.
54, to page 59, for 'J & C C.' *read* J. & I. C.
55, line 10, for 'plaintiffs' *read* plaintiff.
56, line 6, for 'in' *read* on.
80, line 6, for 1815, *read* 1805.
85, line 8, for 1812, *read* 1802.
117, line 20, for 'permission' *read* presumption.
——— 22, for 'presumption' *read* permission.
147, line 11, *dele* 'for' *after* 'sold.'
152, line 26, for 'was' *read* were.
159, line 33, for 1760. *read* 1750
174, line 3, of the head note for 'and' *read* a.
——— 7. of the head note, for 'R' *read* F.
253, line 28, for 1815 *read* 1820.
270, line 7, for 'an inconsiderable' *read* a small.
280, line 14, *dele* 'to' before H. D.
287, line 13, for 'were' *read* was.
303, line 2, for 'State' *read* States.
——— 34, after 'it' *insert* could.
304, line 11, *insert* an, before 'exclusive.'
310, line 18, *insert* not, before 'liable.'
331 line 6, for 'plaintiff' *read* plaintiffs.
377, line 1, for 'ces' *read* defences; and for 'then' *read* than.
382, line 27, for 'been' *read* being.
420, line 34, *dele* ad.
422, line 22, *insert* the before 'faith.'
——— 29, for 'was' *read* were.
423, line 8, for 'were' *read* was.
424, line 4, for 'plaintiffs' *read* plaintiff.
426, line 21, *insert* the, before 'impression.'
429, line 4, for 'plaintiffs' *read* plaintiff.
430, line 9, from the bottom, *dele* 'and'
431, line 10, of the head note, for 'state' *read* act.
433 line 17, for 'being' *read* were.
433, to 440, for 'Houstoun' *read* Houston.
450, line 32, for 'wanting' *read* wanted.
469, line 29, for 'for' *read* as.
479, line 5, for 'of it' *read* fit.
481, line 5, for 'to the' *read* in.
484, line 4, for 1795 *read* 1794.
514, line 32, *after* 'accountable' *add* for.
523, line 7, for, plaintiffs' read insurers.
534, put 'November 10 and December 17,' in the margin.
585, line 9, of the head note, for 'him' *read* such judgment debtor.

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